TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 213.

THE MONTANA MINING COMPANY, LIMITED, PLAINTIFF IN ERROR,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED DECEMBER 18, 1900.

(18,001.)

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1 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Caption.

Be it remembered, that on the twenty-sixth day of June, 1899, the plaintiff herein filed its second amended and supplemental complaint, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, Defendant.

Second Amended and Supplemental Complaint.

Now comes the plaintiff in the above-entitled action, and for a second amended and supplemental complaint, by leave of the court first had and obtained, complains of the defendant herein, and for cause of action alleges:

2 I.

That at the several dates hereinafter mentioned this plaintiff was, and now is, a corporation duly organized and existing under the laws of the then Territory (now State) of Montana, under the corporate name of St. Louis Mining & Milling Company of Montana, and as such was and is entitled to own, enjoy, and possess mining property in the said State, with all the rights, privileges, and immunities incident and appurtenant thereto; and that at said dates the said defendant, Montana Mining Company, Limited, was and now is a foreign corporation, incorporated under the laws of Great Britain, and, as such corporation, by virtue of its compliance with the laws of the then Territory (now State) of Montana, was and is entitled and authorized to do and transact business in said State.

II.

That at the times hereinafter mentioned this plaintiff, as such corporation, was, and now is, the owner of, entitled to, and in the actual possession and occupation of that certain quartz lode mining claim known as the St. Louis Quartz Lode mining claim, and of the quartz, rock and ore and precious metals contained in any and all veins, lodes and ledges of mineral-bearing rock through their entire depth, the tops or apexes of which lie within the surface lines of the said

fractional portion of said St. Louis Lode mining claim, although such veins, lodes or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side
3 line of the surface of the said St. Louis Quartz Lode mining claim, which is situated in Ottawa mining district, in the county of Lewis and Clarke, and State of Montana, and more particularly described as follows, to wit:

Beginning, for the description of lots Nos. 54 and 55 A at corner No. 1, a granite stone 16 by 12 by 12 inches, marked "1 M. C. 54," a mound of stones alongside, from which the quarter-section corner on south boundary of section 36, in township 12 north of range 6 west of the principal meridian bears south 74 degrees and 15 minutes east 353 feet distant.

Thence, first course, magnetic variation 19 degrees east, south 21 degrees and 15 minutes west, 102 feet, intersect line between townships 11 and 12 north of range 6 west, a granite stone 15 by 14 by 12 inches, marked "54 M. C. 55 A," 450 feet to a point from which a shaft bears north 67 degrees, west 285 feet distant, and from said shaft an open cut, 3 by 5 feet, 100 feet long, runs south 54 degrees east; 655 feet to a point from which a shaft bears west 153 feet distant, 1,097 feet to corner No. 2, a slate stone 20 x 12 x 5 inches, marked "2 M. C. 55 A," a mound of stones alongside, from which the center of discovery shaft bears north 35 degrees 30 minutes west 289 feet distant.

Thence, second course, magnetic variation 19 degrees east, south 51 degrees 30 minutes west, 403 feet to corner No. 3, a slate stone 14 by 10 by 4 inches, marked "3 M. C. 55 A," a mound of stones alongside, from which the southeast location corner bears south 10 degrees east 435 feet distant.

Thence, third course, magnetic variation 19 degrees east,
4 north 45 degrees 30 minutes west, 600 feet to corner No. 4, a granite stone 20 by 9 by 7 inches, marked "4 M. C. 55 A," a mound of stones alongside, from which the southwest location corner bears south 79 degrees west 182 feet distant.

Thence, fourth course, magnetic variation 18 degrees east, north 51 degrees 15 minutes east 425 feet to corner No. 5, a granite stone 16 by 12 by 6 inches, marked "5 M. C. 55 A," a mound of stones alongside.

Thence, fifth course, magnetic variation 19 degrees east, north 21 degrees 45 minutes east, 529.7 feet distant, intersects said township line, a granite stone 18 by 16 by 7 inches, marked "54 A, 54 M. C.," 1,069 feet to corner No. 6, a granite stone 18 by 12 by 6 inches, marked "6 M. C. 54 A," from which a fir tree 13 inches in diameter, marked "6 M. C. 54 B. T.," bears north 15 degrees east 24 feet distant, and a pine tree 5 inches in diameter, marked "C. M. C. 54 B. T.," bears south 54 degrees east, 21.5 feet distant.

Thence, sixth course, magnetic variation 19 degrees east, south 45 degrees 30 minutes east 515.5 feet to corner No. 1 of lot No. 40, the Drumlummon Lode claim, 579 feet to corner No. 1, the place of beginning, said lots Nos. 54 and 55 A extending 1,500 feet in length

along said St. Louis vein or lode, the granted premises in said lot containing 18 acres and ninety-three-hundredths of an acre.

Save and except that portion thereof known as the thirty-foot strip or compromise ground which belongs to and is a part and portion of what is known and designated as the Nine Hour Lode
5 mining claim, which said fractional portion of said St. Louis Lode mining claim is described as follows, to wit:

Commencing at a point from which the center of the discovery shaft of the Nine Hour lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode between corners two and three, fifty feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode claim, between corners two and three thereof, 226 feet to a point on the boundary line of the St. Louis lode, between corners one and two; thence south 20 degrees 28 minutes west along said boundary, between corners one and two 60.5 feet to corner No. 2 of the St. Louis lode; thence south 51 degrees 30 minutes west 403 feet to corner No. 3 of said St. Louis lode; thence north 45 degrees 30 minutes west along the line of boundary of the said St. Louis lode, between corners three and four, thirty feet to a point; thence north 50 degrees 28 minutes east along a line parallel to the boundary line of the St. Louis lode, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.50 square feet, together with all mineral contained therein.

III.

That the said defendant, Montana Mining Company, Limited, is and was the owner of what is known and designated as the Nine Hour Quartz Lode mining claim, situate and being east of the said St. Louis Lode mining claim, and including the 30-foot strip or compromise ground aforesaid, and that the discovery, loca-
6 tion and recordation of the said St. Louis Lode mining claim and the United States patent therefor was made prior to the discovery, location and recordation and patent to the said Nine Hour Lode mining claim.

IV.

That the dip of one of the veins having a portion of its top or apex inside of the surface location and patented ground of the said St. Louis mining claim is to the east and dips under and beneath the said Nine Hour Lode mining claim, including the said thirty-foot strip or the compromise ground, which is a part and portion of the said Nine Hour Quartz Lode mining claim, which said portion of said vein has its top or apex within the said St. Louis mining claim as follows, to wit: Commencing at a projected parallel end line of said St. Louis Quartz Lode mining claim, at a point on the east side line thereof, between corners Nos. 1 and 2, extended vertically downward, whereat it passes through the hanging wall of said vein, lode, or ledge, at a point from which corner No. 1, being the northeast corner of said St. Louis Quartz Lode mining claim, bears

north 12 degrees 15 minutes east, distant 520 feet, where said hanging wall is disclosed at the surface by an upraise of said projected parallel end line, 5 feet west of the east side line of said St. Louis Quartz Lode mining claim; thence, from where the said projected parallel end line passes through said east side line of said claim, and along the east side line of the said claim between corners Nos. 1 and 2, south 21 degrees 15 minutes west, 512.7 feet to a point, being the intersection of the said east side line of said St. Louis Quartz
7 Lode mining claim, between corners Nos. 1 and 2, with the west line of the said thirty-foot strip hereinbefore described; thence south 59 degrees 50 minutes west 108 feet and along the west line of the said thirty-foot strip, to a projected parallel end line of said St. Louis Quartz Lode mining claim, extended vertically downward, which passes through the hanging wall of said vein at the surface and at the crossing of the said hanging wall with the west line of the said thirty-foot strip.

That it is also the owner of, in possession and entitled to the possession of an additional portion of the said apex of said claim lying to the south of the southern point hereinbefore mentioned, a distance of twenty-five feet, whereat the foot wall of the said vein passes out of the east side line of the said St. Louis Lode mining claim.

A map or plat showing the point at which the said vein enters said St. Louis Lode mining claim as so hereinbefore described, and whereat the same departs therefrom upon the east line of said claim is hereto attached, marked Exhibit "A," and made a part of this complaint, and to which reference is made.

V.

That notwithstanding the right of the said plaintiff in the premises, said defendant, on or about the thirtieth day of June, 1893, knowingly, wrongfully, and unlawfully, by means of drifts, shafts, tunnels and underground workings, entered into and upon that portion of the vein, lode or lead so apexing within the said St. Louis mining claim, and commenced extracting quartz, rock and ore
8 therefrom, and removing the same, and converting it to its own use and benefit, and are now still removing and converting the same, which said quartz, rock and ore is of the value of two hundred thousand dollars; on account thereof this plaintiff has been damaged in said sum.

That since the filing of the original complaint herein, and up to the twenty-sixth day of June, 1899, said defendant, Montana Mining Company, Limited, has extracted a large quantity of quartz, rock and ore from the premises and veins above described and within the planes aforesaid, and converted the same and the minerals therein contained to their own use, of the value of fifty thousand dollars, and to the damage of this plaintiff in said sum.

Wherefore, plaintiff prays judgment for the said sum of two hundred and fifty thousand dollars, together with its costs and disbursements in this behalf expended.

TOOLE, BACH & TOOLE,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
State of Montana, County of Lewis and Clarke, } ss:

On this twenty-fourth day of June, A. D. 1899, personally appeared before me, Harry Harris, a notary public in and for the said county and State, William Mayger, general manager and superintendent of The St. Louis Mining & Milling Company of Montana, the plaintiff corporation above named, who being by me duly sworn, deposes and says: That he is the general manager and superintendent of
9 said company and familiar with its business; that he has read the foregoing bill of complaint, and knows the contents thereof; and that the same is true to the best of his knowledge, information and belief.

WILLIAM MAYGER.

Subscribed and sworn to before me this twenty-fourth day of June, A. D. 1899.

HARRY HARRIS,
Notary Public in and for Lewis & Clarke County, State of Montana.

(Endorsed:) No. 291. (Title of court and cause.) Second amended and supplemental complaint. Filed and entered June 26, 1899. Geo. W. Sproule, clerk.

10 The summons in this cause as heretofore issued being in the words and figures as follows, to wit:

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY (LIMITED), RAWLINSON T. BAYLISS, Alexander Burrell, Nicholas Francis, Isaac Warren, Joseph Harvey, John Jewell, and Thomas Howkins, Defendants.

Action brought in the said circuit court and the complaint filed in the office of the clerk of said circuit court in the city of Helena, county of Lewis and Clarke.

Summons.

The President of the United States of America to Montana Milling Company (Limited), Rawlinson T. Bayliss, Alexander Burrell, Isaac Warren, Joseph Harvey, Nicholas Francis, John Jewell, and Thomas Howkins, Greeting:

11 You are hereby required to appear in an action brought against you by the above-named plaintiff, in the circuit court of the United States, ninth circuit, in and for the district of Mon-

tana, and to file your plea, answer or demurrer to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the clerk of said court, in the city of Helena, and county of Lewis & Clarke, within twenty days after the service on you of this summons, or judgment by default will be taken against you.

The said action is brought to recover a judgment against you, said defendants, for the sum of two hundred thousand — damages, sustained by plaintiff from you, said defendants, for wrongfully, unlawfully and willfully, on or about the thirtieth day of June, 1893, entering upon one of the veins, lodes or ledges bearing gold, silver, lead and other precious metals, and having its top or apex within the surface location of the St. Louis Quartz Lode mining claim, the property of said plaintiff; and within the vertical planes thereof, and extracting therefrom and taking large quantities of ore and quartz rock bearing gold, silver, lead and other precious metals lying within the premises of said plaintiff, and which you have converted to your own use and benefit (for a more particular description of said premises you are hereby referred to the complaint), all of which will more fully appear by reference to the complaint on file herein, a copy of which is herewith served, and for costs of suit. And if you fail to appear and plead, answer or demur, as herein required, your default will be entered, and the plain-
12 tiff will apply to the court for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this eighteenth day of September, one thousand eight hundred and ninety-three, and of our Independence the one hundred and eighteenth.

[SEAL.] GEO. W. SPROULE, *Clerk.*

UNITED STATES MARSHAL'S OFFICE, }
District of Montana. }

I hereby certify that I received the within writ on the nineteenth day of September, 1893, and personally served the same on the twentieth day of September, 1893, on the Montana — Company, Limited, a corporation, by delivering to and leaving with Rawlinson T. Bayliss, agent and general manager of the said corporation, on Rawlinson T. Bayliss personally, and Alexander Burrell, Isaac Warren, Jos. Harvey, Nicholas Francis, John Jewell and Thomas Howkins, said defendants named therein, personally, at Marysville, county of Lewis & Clarke, in said district, a certified copy thereof, together with a copy of the complaint, certified to by the clerk of the United States court.

Helena, Sept. 21, 1893.

WM. F. FURAY.
United States Marshal,
By GEO. A. LECRESSY, *Deputy.*

13 (Endorsed:) No. 291. (Title of court and cause.) Summons. Filed Sept. 25, 1893. Geo. W. Sproule, clerk.

And thereafter, to wit, on the thirtieth day of June, 1899, the answer of defendant was filed herein, being as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Answer to Second Amended and Supplemental Complaint.

Comes now the defendant above named, and for its answer to the second amended and supplemental complaint of plaintiff on file herein, says:

I.

It admits the allegations contained in paragraphs numbered 1, 2, and 3 of the said second amended and supplemental complaint.

II.

It denies each and every other allegation in the said second amended and supplemental complaint contained.

14 III.

And this defendant, further answering, says that the plaintiff is estopped from claiming any of the mineral found or which may hereafter be found in said thirty-foot strip or compromise ground, for that heretofore, to wit, on or about the seventh day of March, A. D. 1884, one Charles Mayger, who was then and there the predecessor in interest of plaintiff, made, executed and delivered to William Robinson, James Huggins and Frank P. Sterling, who were and are the predecessors in interest of this defendant, a bond for a deed, wherein and whereby he covenanted and agreed to convey the said thirty-foot strip or compromise ground to the predecessors in interest of this defendant, or their assigns, with all the mineral therein contained, a copy of which said bond is hereto attached, marked Exhibit "A," and made a part of this answer. That thereafter and after the said Charles Mayger had obtained a United States patent for the whole of said St. Louis Lode mining claim, including said thirty-foot strip or compromise ground, the said Mayger, in order to cheat and defraud this defendant, assumed to convey the said compromise ground to the above-named plaintiff. That thereafter this defendant demanded of and from the said defendant and from the said Mayger a deed for the said compromise ground in accordance with the terms and provisions of the bond aforesaid, and the said defendant and the said Mayger having refused and declining to make, execute or deliver such a deed, this defendant thereafter, and on or about the sixth day of September, A. D. 1894, commenced an action in the dis-
15 trict court of the first judicial district of the State of Montana, within and for the county of Lewis & Clarke, wherein this

defendant was plaintiff and the above-named plaintiff, together with the said Charles Mayger, were defendants, to compel the specific performance of the said bond for a deed hereinbefore mentioned and set forth; that thereafter such proceedings were had in said action as that on the first day of June, A. D. 1895, judgment was duly made and entered therein in favor of this defendant, the plaintiff therein, and against the plaintiff, defendant in said action, whereby, among other things, it was ordered, adjudged, and decreed that the said bond hereinbefore mentioned be specifically performed, and that the defendant, the above-named plaintiff, make, execute and deliver to this defendant a good and sufficient conveyance in fee-simple absolute, free from all encumbrances for the premises mentioned and described in the complaint in said action and in the bond hereinbefore mentioned; that in pursuance of said judgment, order and decree the said plaintiff, on or about the first day of July, A. D. 1895, made and executed a deed to this defendant of and for the said premises and of all the mineral therein contained; and thereafter the said deed was duly delivered to this defendant, a copy of which said deed is hereunto annexed, marked Exhibit "B," and made a part of this answer. And this defendant avers that in and by the said proceedings and the said deed the said plaintiff is estopped from claiming any part of the said compromise ground or thirty-foot strip aforesaid, or any mineral contained therein.

16 Wherefore, having fully answered, the defendant prays to be hence dismissed without day, and for its costs in this behalf expended.

CULLEN, DAY & CULLEN,
Attorneys for Defendant.

STATE OF MONTANA, } ss:
County of Lewis & Clarke, }

Alexander Burrell, being first duly sworn, deposes and says: The above-named defendant is a corporation, and I am an officer thereof, to wit, I am its general manager; I have read the foregoing answer and know the contents thereof, and the facts therein stated are true to the best of my knowledge, information and belief.

ALEXANDER BURRELL.

Subscribed and sworn to before me this thirtieth day of June, A. D. 1899.

W. E. CULLEN, JR.,
Notary Public in and for the County of Lewis & Clarke, Montana.

EXHIBIT "A."

Know all men by these presents: That I, Charles Mayger, am held and firmly bound unto William Robinson, and James Huggins, and Frank P. Sterling in the sum of fifteen hundred dollars, for the payment of which, well and truly to be made, I hereby bind myself, my heirs, executors, administrators and assigns, firmly by these presents.

17 Sealed with my seal and dated this seventh day of March, A. D. 1884.

The consideration of this obligation is such that, whereas, a certain cause now depending in the district court of the third judicial district, Lewis & Clarke county, Montana, between William Robinson and James Huggins, plaintiffs, and Charles Mayger, defendant, has been compromised and settled, and the said William Robinson and James Huggins have agreed to withdraw certain objections to the application of the said Charles Mayger, for patent, now pending in the United States land office at Helena, Montana.

Now, then, in consideration thereof, and the further consideration of one dollar, to the said Charles Mayger in hand paid, by the said William Robinson and James Huggins and Frank P. Sterling, the receipt of which is hereby confessed, hereby covenants, promises and agrees to proceed at once upon his application now pending in the United States land office at Helena, Montana, for a patent to the St. Louis Lode claim described therein, and situated in Lewis & Clarke county, Montana Territory, and procure as soon as practicable a Government patent therefor, and, when such title shall have been procured according to said application, said Charles Mayger hereby covenants, promises and agrees, upon the demand of the said William Robinson and James Huggins and Frank P. Sterling, or their heirs or assigns, to make, execute and deliver to the said William Robinson, his heirs or assigns, a good and sufficient deed

18 of conveyance of that certain lot, piece or parcel of mining ground, situate in Lewis & Clarke county, Montana Territory, and comprising a part of two certain quartz lode mining claims, known as the St. Louis Lode claim and the Nine Hour Lode claim, and particularly described as follows, to wit:

Commencing at a point from which the center of discovery shaft of the Nine Hour lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode claim, between corners two and three, two hundred and twenty-six feet (226) to a point on the boundary line of the St. Louis lode between corners one and two; thence south 20 degrees 28 minutes west along said boundary line, between corners one and two, 60.5 feet to corner No. 2, of St. Louis lode, 400.31 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the line of boundary of St. Louis lode, between corners three and four, thirty feet to a point; thence north 50 degrees 28 minutes east along a line parallel to the boundary line of the St. Louis lode, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.50 square feet, together with all the mineral therein contained. And if the said Charles Mayger, his heirs or assigns, shall make, execute and deliver the said deed of conveyance as by this agreement provided and intended, then this bond and agreement to be null and void, otherwise to be and remain in full force and effect.

19 Witness my hand and seal the day and year first above written.

CHARLES F. MAYGER. [SEAL.]

The name of Frank P. Sterling was inserted in this instrument as one of the obligees before the signing and delivery thereof.

CHARLES F. MAYGER. [SEAL.]

Witness:
J. K. TOOLE.

TERRITORY OF MONTANA, } ss:
County of Lewis & Clarke, }

On the seventh day of March, eighteen hundred and eighty-four, personally appeared before me, R. H. Kemp, a notary public in and for the said county of Lewis & Clarke, Territory of Montana, Charles F. Mayger, whose name is subscribed to the annexed instrument as party thereto, personally known to me to be the same person described in and who executed the said annexed instrument as a party thereto, and who duly acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in the certificate first above written.

[NOTARIAL SEAL.] R. H. KEMP,
Notary Public.

Filed and recorded March 8, 1884, at 3 p. m.

O. B. TOTTEN.

20 EXHIBIT "B."

Deed to St. Louis Mining & Milling Co. of Montana to Montana Mining Co., Ltd.

This indenture, made and entered into this first day of July, in the year of our Lord one thousand eight hundred and ninety-five, between the St. Louis Mining & Milling Company of Montana, an incorporation duly organized under the laws of the State of Montana, by William Mayger of the county of Lewis and Clarke and State of Montana, its duly authorized agent and attorney-in-fact, the party of the first part, and the Montana Mining Company, Limited, an incorporation duly organized under the laws of the Kingdom of Great Britain and Ireland, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to it in hand paid, the receipt whereof is hereby confessed, has granted, bargained, sold, remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part and to its

assigns forever, all and singular those certain premises, situate, lying and being in Ottawa (unorganized) mining district, in the county of Lewis & Clarke and State of Montana, more particularly bounded and described as follows, to wit:

Commencing at a point from which the center of the discovery shaft of the Nine Hour lode bears south 39 degrees 32
21 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode claim, between corners one and two; thence south 20 degrees 28 minutes west along the line of said boundary, between corners one and two, 60.5 feet to corner No. 2; thence 403 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the line of boundary of the said St. Louis Lode claim, between corners three and four, thirty feet distant to a point; thence north 50 degrees 28 minutes east along a line parallel to the said boundary line of the St. Louis Lode claim, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.5 feet, together with all the mineral therein contained. Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz rock and earth therein, and all the rights, privileges and franchises thereto incident, appended or appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits therein, and also all and every right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the said premises, with the appurtenances and privileges thereto incident, unto the
22 said party of the second part and its assigns forever.

In witness whereof, the said Willam Mayger, as attorney-in-fact and agent as aforesaid for the said party of the first part, has hereunto subscribed its name, set his hand and seal this first day of July, A. D. 1895, as its said agent.

ST. LOUIS MINING & MILLING CO., [SEAL.]
By WILLIAM MAYGER,
Its Agent and Attorney-in-fact.

STATE OF MONTANA, } ss:
County of Lewis & Clarke, }

Be it remembered that on this first day of July, A. D. 1895, personally appeared before me, Harry H. Yeager, a notary public in and for county of Lewis & Clarke, and State of Montana, the St. Louis Mining & Milling Company of Montana, by and through William Mayger, its duly authorized agent and attorney-in-fact, personally known to me to be the same person described in and who executed the said foregoing instrument as such agent and attorney-in-fact, who duly acknowledged to me that, as such agent and at-

torney-in-fact, he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal this the day and year first herein in this certificate written.

[NOTARIAL SEAL.] HARRY H. YEAGER,
Notary Public.

23 (Endorsed:) No. 291. (Title of court and cause.) Answer to supplemental complaint. Filed and entered June 30, 1899. Geo. W. Sproule, clerk.

And thereafter, to wit, on the fourteenth day of July, 1899, the replication of said plaintiff was filed, being as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant. } No. 291.

Replication.

And the said plaintiff, for replication to the answer of the said defendant and the new matter set up by way of estoppel in said defendant's answer, waiving no objections to the competency of the same in this action at law, as to the third paragraph in said answer, denies that plaintiff is estopped for any of the causes or reasons set up in the said answer, or any other cause or reason, from
24 claiming any of the mineral found, or that may be at any time hereafter found, in said thirty-foot strip or compromise ground.

Admits that the said bond was executed as in said answer stated, and avers that the same was executed and made on account of an application of the said Mayger for a patent to the St. Louis Lode mining claim, and on account of an adverse claim interposed by the said defendant's predecessor in interest of said thirty-foot strip or compromise ground, as being a part of what is known as the said Nine Hour Quartz Lode mining claim.

Admits that the said Mayger agreed to convey said thirty-foot strip or compromise piece of ground, with all the minerals therein contained, to the predecessor in interest of the said defendant, and avers that the said claim of plaintiff comprises no minerals contained in or beneath said thirty-foot strip or compromise ground, except such as is contained in leads, lodes or ledges, which have their tops or apexes within the St. Louis Quartz Lode mining claim, exclusive of said thirty-foot strip or compromise ground.

And the said plaintiff further avers that it is seeking to recover only such quartz rock or ore and the value thereof, and the damages

for the removal and conversion of the same, as comprises lodes, leads or ledges having their tops or apexes within the boundary lines of the said St. Louis Lode mining claim, exclusive of the said thirty-foot strip or compromise ground.

Admits that said Mayger obtained a patent for the said
25 thirty-foot strip or compromise ground, but denies that any conveyance was made by him to plaintiff to defraud any one, and avers that all matters in relation thereto have been concluded by the judgment of the court and the deed mentioned in said defendant's answer executed in pursuance thereof.

And the said plaintiff, for further replication to the new matter set up in the said defendant's answer, shows unto this honorable court that the said thirty-foot strip or piece of compromise ground comprised a part and portion of what was known as the Nine Hour Lode claim mentioned in the said defendant's answer, and that no other right or title has been conveyed by reason of the said deed than such as was attached and incident to the said thirty-foot strip or compromise ground, and that the minerals therein contained were intended to comprise and did comprise only such minerals as were contained in veins, lodes, or ledges having their tops or apexes inside of the said thirty-foot strip, all of which will more fully appear by reference to a certified copy of the judgment-roll in the case hereinbefore referred to and filed in the equity suit in aid of this action, and which plaintiff asks may be considered in this cause as though reproduced and fully set forth at large.

And plaintiff alleges the fact to be that the said thirty-foot strip or compromise ground was at all times a part and portion of the quartz lode mining claim, known as the Nine Hour claim, and that the same was never a part or portion of the St. Louis Quartz Lode mining claim mentioned in the complaint herein, and that in an action heretofore pending between the parties hereto in dis-
26 trict court of the first judicial district of the State of Montana, in and for the county of Lewis & Clarke, in which said action the defendant herein was plaintiff, and this plaintiff and Charles Mayger, one of its predecessors in interest, were defendants, which said action was based upon the agreement mentioned in said answer and was brought for the purpose of compelling the defendants therein, in accordance with said agreement, to execute and deliver to the plaintiff therein a good and sufficient deed for the premises known as the thirty-foot strip or compromise ground and mentioned in the answer in this action, it was found and determined by the court, as a matter of fact, that the said thirty-foot strip or compromise ground was at all times a part of the said Nine Hour Lode mining claim, and was by the parties to said agreement agreed to be a part thereof, and that the said agreement with the said Charles Mayger, a copy of which is attached to the amended answer herein, was made and given for the purpose of settling and determining and fixing the boundary line between the said Nine Hour Lode mining claim and the St. Louis Lode mining claim, the boundaries of which claims had been and were at the time of the execution of the said agreement in conflict, and concerning which a controversy

then existed between the parties to said agreement; and plaintiff further alleges that the deed mentioned in said answer, and a copy of which is annexed thereto, is the deed which the court adjudged in said action should be executed for the purpose of performing the agreements above referred to.

27 Wherefore, plaintiff demands judgment as heretofore demanded in its amended and supplemental complaint.

E. W. TOOLE AND
THOMAS C. BACH,
Attorneys for Plaintiff.

STATE OF MONTANA, } ss:
County of Lewis & Clarke, }

William Mayger, being duly sworn, deposes and says: That he is an officer, to wit, the superintendent and general manager of the above-entitled plaintiff, which is a corporation; that he has read the foregoing replication, and knows the contents thereof; and that the matters stated therein are true to his best knowledge, information and belief.

WILLIAM MAYGER.

Subscribed and sworn to before me this fourteenth day of July, 1899.

[SEAL.] HARRY HARRIS,
Notary Public in and for Lewis & Clarke County, Montana.

Due and timely service of a copy of this replication acknowledged and admitted this fourteenth day of July, 1899.

CULLEN, DAY & CULLEN,
Attorneys for Defendant.

(Endorsed:) No. 291. (Title of court and cause.) Replication. Filed and entered July 14, 1899. Geo. W. *W.* Sproule, clerk.

28 And thereafter, to wit, on the twelfth day of August, 1899, the verdict of the jury was filed herein, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff, }
vs. }
MONTANA MINING COMPANY, LIMITED, Defendant. }

Verdict.

We, the jury in the above-entitled cause, do find our verdict in favor of the plaintiff and for the sum of twenty-three thousand two hundred and nine dollars ($23,209.00).

T. H. CLEWELL, *Foreman.*

(Endorsed:) No. 291. (Title of court and cause.) Verdict. Filed and entered August 12, 1899. Geo. W. Sproule, clerk.

29 And thereafter, to wit, on the sixteenth day of August, 1899, a judgment was duly entered herein which is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Judgment.

Be it remembered, that on this seventh day of August, A. D. 1899, the above-entitled cause coming on for hearing, and the same having been duly submitted to a jury of twelve lawful men, duly empaneled and sworn to try the issue herein, the following verdict was duly returned into court, to wit:

30 "In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Verdict.

We, the jury, in the above-entitled cause, do find our verdict in favor of the plaintiff and for the sum of twenty-three thousand two hundred and nine dollars (23,209.00).

T. H. CLEWELL, *Foreman.*"

It is therefore considered, ordered and adjudged that the said plaintiff have and recover of the said defendant the said sum of twenty-three thousand two hundred and nine dollars ($23,209.00), together with its costs in this behalf expended, taxed at the sum of ninety-five and sixty-five one-hundredths dollars, and that it have execution therefor.

Dated August 16, 1899.

Entered August 16, 1899.

[SEAL.] GEO. W. SPROULE, *Clerk.*

31 Attest: A true copy of judgment as entered.

[SEAL.] GEO. W. SPROULE, *Clerk.*

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant. } No. 291.

Clerks Certificate to Judgment-roll.

I, George W. Sproule, clerk of the circuit court of the United States, for the ninth judicial circuit, district of Montana, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said circuit court, this 16th day of August, 1899.

[SEAL.] GEORGE W. SPROULE, *Clerk.*

(Endorsed:) No. 291. (Title of court and cause.) Judgment-roll. Filed Aug. 16, 1899. Geo. W. Sproule, clerk.

32 And thereafter, to wit, on the twenty-eighth day of August, A. D. 1899, a bill of exceptions was duly allowed, signed and filed, which is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Bill of Exceptions.

Be it remembered, that on the trial of the above-entitled action to a jury, on the eighth day of August, A. D. 1899, that being one of the days of court of the April term, 1899, of the said circuit court, after the said jury had been duly empaneled and sworn to try the case, the defendant objected to the introduction of any testimony on the part of the plaintiff, for that the second amended supplemental complaint, which had been theretofore read to the jury, did
33 not state facts sufficient to constitute a cause of action and did not state facts showing that the plaintiff had no cause of action.

But the court overruled such objection and permitted the plaintiff to offer testimony, to which ruling of the court the defendant then and there duly excepted.

Whereupon the plaintiff called and had sworn as a witness in its behalf Mr. WM. MAYGER, who testified substantially as follows, to wit:

I am the superintendent and general manager of the plaintiff company and have filled that position since 1887. I am acquainted with the discovery vein of the St. Louis Lode mining claim. I have pointed out the discovery shaft to Mr. Keerl, the surveyor.

Whereupon the witness was asked the following question:

Q. And was that on the vein which is in controversy here or not?

To which question the defendant objected for the reason that the same was irrelevant and immaterial, it not being alleged in the complaint that there was any discovery vein in the St. Louis Lode mining claim and no issue upon that point.

But the court overruled such objection, to which ruling of the court the defendant then and there excepted.

The witness answered:

A. No, sir; that was on the vein for which we took the location. I am familiar with the boundaries of the St. Louis mining claim as shown on the map.

Whereupon the witness was asked the following question:

34 Q. Which way does the discovery vein of the St. Louis mining claim run?

To which question the defendant objected for the reason that the same was incompetent, irrelevant and immaterial, there being no allegations in the complaint as to the course or direction of the discovery vein, nor any allegation that there was a discovery vein, the pleadings being limited to the recovery of damages for the extraction of ore from the vein known as the Drum Lummon vein. But the court overruled such objection and permitted the witness to answer, to which ruling of the court the defendant then and there duly excepted.

The witness answered:

A. It runs more parallel with the location of the St. Louis mining claim than it does any other direction—not directly parallel with it, but nearly so. It runs nearly at right angles to the lines marked on the map 3 and 4 and 1 and 6.

Thereupon it was stipulated between counsel, with leave of court, that all testimony offered with reference to the located vein should be received subject to the objection of the defendant, that there was nothing in the complaint which would make such testimony relevant.

The WITNESS (continuing): The vein dips to the east and in the direction of the Nine Hour mining claim. It has been developed within three or four hundred feet of the north end line and within seventy feet of the south end line of the St. Louis claim.

The witness having testified that he executed the deed, a copy of which is attached to the answer herein, the following question was asked him:

35 Q. Under what circumstances was that deed executed?

To which the defendant objected as follows: "If that is evidence anywhere it is evidence in rebuttal and not on the direct case."

The objection was by the court sustained on that ground.

Plaintiff thereupon called one JAMES S. KEERL, who testified as follows:

I am a civil engineer. I have surveyed the premises known as the Nine Hour and adjoining claims and have made a map of it, which is here produced in court, marked Plaintiff's Exhibit No. 1. (Here insert map.)

The vein claimed by the plaintiff in this case is bounded by a line drawn down through a point in the easterly boundary line of the St. Louis claim 520 feet south from corner No. 1 of the said claim, and by a line drawn down through the westerly line of the compromise ground, at a point 108 feet southerly from the point of intersection of the westerly side line of the compromise ground with the easterly side line of the St. Louis claim.

Thereupon witness was asked the following question:

Q. And how is that line drawn there with reference to the end lines of the St. Louis claim?

To which question the defendant objected for the reason that the same was incompetent and immaterial, it not having been established which were the end lines, or which the side lines of the St. Louis claim.

36 But the court overruled such objection and permitted the witness to answer, to which ruling of the court the defendant then and there excepted.

A. It is drawn parallel to the end lines of the St. Louis claim to corner- 3 and 4. I have made measurements and calculations to ascertain the amount of ore taken out to the east of the west side line of the compromise ground and north of the one hundred and eight foot plane. There is a stope which is an extension of the eighty-five-foot level south of the compromise ground, then there is a stope on the twenty-foot level, lying immediately north of the one hundred and eight foot plane, and a stope in the one hundred and ninety foot level. The line marked one hundred and eight foot plane and the line marked one hundred and thirty-three foot plane are parallel to the five hundred and twenty foot line.

Whereupon the witness was asked the following question:

Q. Now, confine yourself to the measurements which were made to the east of the line known as the west side line of the thirty-foot strip—I wish you would give to the jury the different calculations

you made north of the one hundred and eight foot plane, and south of the plane which intersects the easterly boundary of the St. Louis claim at the point where the westerly boundary of the thirty-foot strip intersects it?

To which the defendant objected, for the reason that the testimony sought was incompetent, irrelevant and immaterial under the pleadings, it being alleged in the complaint that the defendant was the owner of the ground known as the compromise ground,
37 "together with all the mineral therein contained," and alleged in the answer that the said compromise ground had been conveyed by the plaintiff to the defendant in pursuance of a bond for a deed describing the said compromise ground by metes and bounds, and conveying the *said* to the said defendant, "together with all the mineral therein contained," which said bond and deed, being attached as exhibits to the answer, were not denied, but specially admitted, by the replication, and that therefore plaintiff was estopped from claiming any mineral within said compromise ground.

But the court overruled such objection and permitted the witness to testify with reference thereto, to which ruling of the court the defendant then and there duly excepted.

A. In my calculations I have given them block numbers, which I will mark on the map. Block No. 8 is designated as the stope at the south end of the St. Louis Company's eighty-foot level.

The plaintiff then offered in evidence the complaint and exhibit attached thereto, the findings and the judgment of the court, hereinafter contained and set forth in the evidence in rebuttal. To which the defendant objected because it was not the proper time to offer the same.

Whereupon the witness was asked the following question:

Q. And how much did you compute was extracted from that?

38 To which question the defendant objected for the reason that it appeared from the testimony that the same was within the vertical lines of the compromise ground, and under the pleadings plaintiff is estopped to claim any mineral found in said stope.

But the court overruled such objection and permitted the witness to answer, to which ruling of the court the defendant then and there duly excepted.

A. The cubic feet in block No. 8 is 2,187.9, equivalent to 168.3 tons. Block No. 9 is the stope above the twenty-foot level, lying north of the one hundred and eight foot plane and east of the west line of the thirty-foot strip.

Q. How much was extracted from that?

To which question the defendant objected for the reason that the testimony shows that the same was within the compromise ground and that, under the pleadings and by virtue of the bond and deed attached as exhibits to the answer, the plaintiff was estopped from claiming such mineral.

But the court overruled such objection and permitted the witness to testify, to which ruling of the court the defendant then and there duly excepted.

A. There is 798 cubic feet, equivalent to 61.4 tons. Block No. 10 is the ore removed from the one hundred and ninety foot level, north of the one hundred and eight foot line—that is 1,904 cubic feet, or 146.5 tons. A small quantity of ore was taken from the winze at the end of plaintiff's eighty-five-foot level. The ore so taken is west of the west line of the thirty-foot strip. There was 28.8 cubic feet of it, equivalent to 2.2 tons. I marked this block No. 11.

39 Cross-examination:

The average height of the stope, block No. 8, is 15.3, the average width 6.5 feet, average length 22 feet. There is 35 feet of block No. 10 north of the one hundred and eight foot line. It is 8 feet high and 6.8 feet wide. Those are the averages.

Plaintiff also called and had sworn one JOHN R. PARKS, who testified substantially as follows, to wit:

I am a mining engineer. I have been consulting engineer of the plaintiff company for about nine years. I have examined the underground and surface workings of the Nine Hour claim.

Whereupon the witness was asked the following question:

Q. Do you know where the discovery point of the St. Louis is?

To which question the defendant objected, for the reason that the same was immaterial, it not being alleged in the complaint that there was any discovery point or vein within the boundaries of said claim.

But the court overruled such objection and permitted the witness to testify, to which ruling of the court the defendant duly excepted.

A. It is connected with the discovery vein. The discovery vein runs generally parallel to the side lines.

Thereupon the witness was asked the following question:

Q. How far is it developed by underground drifts and works?

40 To which question the defendant objected, for the reason that there was no issue made by the pleadings relative to the discovery vein, or any vein, save the Drum Lummon.

But the court overruled such objection and permitted the witness to testify, to which ruling of the court the defendant duly excepted.

A. On the south end it has been developed within seventy feet, and the same vein has been developed by people owning the adjoining property to within a short distance of the south end. It crosses the south end line. Northerly it is followed into the sixty-five-foot shaft and 60, to eighty feet beyond. I think it runs out of

the north end of the claim. The discovery vein dips to the east. The apex of the Drum Lummon is within the St. Louis claim at the five hundred and twenty foot point, and continues southerly to the one hundred and eight foot point. It dips to the east. Between these planes I have gone into the underground workings to ascertain what ore has been taken out. We divided the ground up into three blocks. These are blocks Nos. 8, 9 and 10 mentioned by Mr. Keerl.

Thereupon the defendant objected to all of the testimony relating to these blocks, for the reason that it appears from the testimony that blocks Nos. 8, 9 and 11 were within the compromise ground, and that under the pleadings plaintiff was estopped to claim any mineral found therein, and was likewise estopped by the pleadings from claiming any ores in block No. 10.

But the court overruled such objection and permitted
41 the witness to answer the question, to which ruling of the court the defendant then and there duly excepted.

A. Block No. 8 is the ground stoped out by the Montana Company at the south end of the eighty-five-foot level and lies east of the east side line of the St. Louis Lode claim and north of the one hundred and eight foot line. The cubic contents of this block are as stated by Mr. Keerl. I took samples from block No. 8, which averaged $13.28 per ton. The ore taken from near the top of the winze, block No. 11, ran sixty and eighty cents to one dollar and twenty cents per ton.

Block No. 9 is a stope above the twenty-foot level, east of the St. Louis side line and north of the one hundred and eight foot line. The average is nine and a half feet in height, fourteen feet in width at right angles to the walls is six feet. The volume of the stope is 798 cubic feet. I took samples at the time the stope was driven right near there, and recently, within the last few weeks, I have taken samples in the Montana Company's apex shaft, which practically shows the remainder of the face of this old drift. The gold and silver value in this ore was $165.10 per ton. I assisted in measuring block No. 10. Its cubical contents as given by Mr. Keerl. In measuring its height we were limited by the timbering. We do not know just how much stoping has been done above that. I determined the value of the ore in that stope from the nearest adjoining ground where we could get the ore. The value of that was $127.14 per ton, or a gross value of $18,626.01.

42 Block No. 11 is 6 feet long, one foot wide, and 4.8 feet deep. I did not compute its value.

Block 9 was measured away back in 1894. The defendant company's miners were there working in block 9 at the time. Block 9 is inaccessible at present, and while portions of the level may be open you cannot get to it by reason of the fact that other portions are filled up by caved ground. There are several levels between these planes. The four-hundred-foot level extends the full length of the ground.

Thereupon the witness was asked the following question:

Q. Do you know as to the use of the level—the four-hundred—level—do you know whether this has been used between the five hundred and twenty and one hundred and eight foot planes?

Thereupon defendant objected to the said question for the reason that the same was irrelevant and immaterial, and that this is an action for the recovery of damages for the alleged extraction and conversion of ores claimed by the plaintiff, and is not an action to recover for the use of levels constructed by the defendant in its own property.

But the court overruled such objection and permitted the witness to testify, to which ruling of the court the defendant then and there duly excepted.

A. Yes, sir; it has. I have seen them using it within the past three weeks and prior to that time. They were using it the first time I entered the mine, which was in 1892–'93 or '94. The
43 level is drifted through the Drum Lummon vein, and runs between the lines of the plane claimed by plaintiff.

Cross-examination:

There was from one hundred to one hundred and twenty-five pounds of samples taken in block 8. We divided the stopes up into sections and cut across the whole stope, and gathered the material on canvas. We sampled both the roof and base of the stopes in this manner. This sample gave us, 4 oz. in gold per ton and 8.8 oz. in silver.

Block 9 was surveyed several years ago from the twenty-foot level. We did not cross-section it at this time. We took it from our notes, as we had cross-sectioned it before. The survey was made, I think, in the fall of 1894, about the time an injunction was granted to prevent the sinking of the apex shaft. There was no one working in block No. 9 when the survey was made. I believe the defendant company had been enjoined from working. Of my own knowledge I did not see the ore in block 9 being mined. I don't know absolutely. I know that somebody outside of our company stoped that ground out. We did not do it, and when I went up there I found it had been done. I do not remember that I saw the men working there. I may have seen them, but I do not remember it, but I know it was done. I sampled it; I took three sacks away; they weighed in the neighborhood of eight pounds each. From this we got the average of $161.10. It is very rich ore. It was taken from the Montana Company's apex shaft.

Block 10 was surveyed in 1894. Part of it was surveyed
44 since July 5—that was the north end of it, in the neighborhood of thirty feet. None of the upraise is in block 10. Block 10 was run by the defendant company. I have been through the level and seen the men at work.

I never went into the Nine Hour ground, except by permission of the court and under its order. On block 10 I could not get any samples. I took my samples from the nearest point. The nearest available point is one hundred feet up the winze, where the ore is ex-

posed. It is within that, probably eighty-five or ninety feet, I think. I took the ore out through the lagging. I took about 8 pounds, for this sample. It went $127.14. The winze at the point where the sample was taken was from high-grade ore. It carried 6.4 ounces in gold and 4.8 ounces in silver. I took no samples from the north end of block 10, nor from any point immediately above it. The sample was taken about eighty feet above and above the middle or southern portion. I did not examine the level to see if I could find any ore, because that would have taken too much time. I could not get at the ore as well below as I could above. I could not get at what I believed was the ore body, the rich ore which had been taken out, and I wanted to get the nearest thing to approximate to that ore. I saw some ore in the northern portion of the east side of the level in block 10 when I was there. I don't know the quantity. It was an irregular mass in the eastern portion of the one hundred and ninety foot level. There was three or four feet of it in height, and a foot or two in width, the whole length. The level was in low-grade ore for eleven feet. The ore had been removed, though—the good
45 ore had been removed and taken out, but I took no samples of it. Mr. Hand did. This was in 1894. There is six hundred and ten feet of the apex of the Drum Lummon lode lying between the lines of the planes claimed by plaintiff. From the one hundred and eight foot plane northerly the extreme limit of any of the several blocks claimed to be extracted is fifty-five feet.

Plaintiff also called and had sworn one WILLIAM JENKINS, who testified substantially as follows, to wit;

I have been a miner for about twenty-five years. I have worked for the St. Louis Company between six and seven years. I helped sample block No. 8. We had a canvas and the sample was taken across the face of the stope. We spread the canvas down and picked off the ore on the canvas. I helped sack it. We took samples from block 9 and 10. These blocks are on the Drum Lummon vein.

The plaintiff also called and had sworn WALTER PROCTOR JENNEY, a witness of lawful age, who testified substantially as follows:

I am a mining engineer and consulting geologist. I have been employed in that business for thirty years. I have made an examination of the Drum Lummon vein. I have given probably twenty days to the examination and field-work. I have examined the openings on the St. Louis and most of those on the Nine Hour claim. I was shown the discovery point of the St. Louis.

Whereupon the plaintiff asked the witness the following question:

46 Q. Is it connected with the vein?

To which question the defendant objected as being immaterial and irrelevant, and that there is no allegation in the complaint with reference to the discovery vein of the St. Louis Lode mining claim, and no issue in the pleadings with reference thereto.

But the court overruled such objection and permitted the witness

to testify, to which ruling of the court the defendant then and there duly excepted.

A. It is connected with a vein named the discovery vein. It is developed southerly by the Transcontinental tunnel to a point approximately, as shown upon the map, ninety-five feet from the south end of the claim, and it is in ore all the way. It is a strong vein at the face. The dip is nearly vertical, or fifteen at most from the vertical. It is a strong vein. It runs in the direction of the St. Louis end lines. I have examined the Drum Lummon vein. A part of it, approximately six hundred feet, is within the St. Louis claim, within the ground here described. The hanging wall passes out exactly where the one hundred and eight foot plane is cut, cutting the east side of the St. Louis claim as now possessed, that is, the west side line of the thirty-foot strip. I have been in the stopes mentioned. I was in stopes 8 and 10. I cannot now place myself in regard to stope 9. I probably passed through there. They are included within the walls of the Drum Lummon vein and are a part of that vein.

WILLIAM MAYGER was recalled and testified as follows:

47 The ore in block 8 was taken out by the defendant Montana Mining Company between now and a year ago. The ore in block 9 was extracted years ago, between 1893 and 1894, and it was done by The Montana Mining Company, the defendant. Block 10 was extracted also by the Montana Company about the year 1894. The ore in block 11 was extracted during the last year. I fix these things by the various orders issued by this court, granting us the privilege of going in there and making surveys and examinations. I am satisfied that all this work from the one hundred and ninety — level up was done by the Montana Mining Company since 1893.

Cross-examination:

No. 8 was mined last fall. I got out an injunction and restrained them from converting that ore to their own use, and I think the ore is stored subject to the instructions of this court. The court holds it, I believe. This applies also to block 11. I have seen persons at work in block 9. They were employés of the Montana Mining Company. I cannot give their names. The Montana Company's apex shaft was first commenced. We commenced ours three or four days afterward, possibly the next day. We extended our twenty-foot level through until it cut into the Montana Company's apex shaft. We cut it about thirty feet from the top. The ore in block 9 was taken out between the commencement of two injunction suits, but there was one of the suits we brought to stop the sinking of

48 the apex shaft. The side of the stope that was taken out was probably about twenty feet long along the level, six feet wide and fourteen to sixteen feet high. The ground there is not all caved. It is not caved on the end adjoining the St. Louis Company. You can get in the stope now. I looked in about two weeks ago. Some of the ore from block 9 may have crumbled and fallen down, but it did not fall on our side. Whatever fell on our side is there still.

On one occasion when I was in the one hundred and ninety foot level with Mr. Bayliss and Mr. Burrell they showed me a pile of ore that had been removed from north of the one hundred and ninety foot level to a point in the level south of the Nine Hour shaft. I examined it, but I did not take samples of it. I noticed that it carried more or less copper stain, and that was sufficient in my judgment to indicate it to be good ore.

Thereupon plaintiff rested.

The defendant, to maintain the issues on its part, read in evidence a deed from the Montana Company, Limited, to the Montana Mining Company, Limited, mining deed dated the twenty-seventh day of July, 1893, between the Montana Company, Limited, a corporation, and Francis William Pixley, of London, England, by Rawlinson Tenant Bayliss, their attorney-in-fact, parties of the first part, and the Montana Mining Company, Limited, a corporation, etc., party of the second part, consideration six hundred and sixty thousand pounds sterling, whereby the parties of the first part have
granted, bargained, sold, remised, released and forever quit-
49 claimed, and by these presents do grant, bargain, sell, remise, release and forever quitclaim, unto the said party of the second part, and to its successors and assigns forever, all and singular that quartz lode mining claim, mill site and premises situate, lying and being near the town of Marysville in the county of Lewis & Clarke and State of Montana, more particularly described as follows, to wit:

As that certain other lode mining claim, known and called the Nine Hour Lode mining claim, the same being designated in the United States patent therefor as lot No. 63 in township No. 11, north of range 6 west, and designated in the records of the surveyor general as survey No. 1705.

(Signed) THE MONTANA COMPANY, LIMITED, AND
FRANCIS WILLIAM PIXLEY,
The Liquidator Thereof,
By RAWLINSON TENANT BAYLISS,
Their Attorney-in-fact.

Duly acknowledged. Duly filed and recorded July 27, 1893.

Defendant likewise offered and read in evidence the injunction in case numbered 538 and the modification thereof, which is as follows:

(Title of Court, Title of Cause.)

Injunction.

The President of the United States to the Montana Mining Company, Limited, its servants, agents, and employés, Greeting:

Whereas, it has been represented to us in the circuit court
50 of the United States for the ninth circuit, district of Montana, that you are about to and threaten to enter into and upon

that certain portion of the lode, ledge or vein, known as the Drum Lummon lode, situated in what is known as the St. Louis mining claim, in Lewis & Clarke county, Montana, said mining claim being designated and described in the United States land office as lots 54 and 55 A, township 11 and 12 north, range 6 west, as is included between two vertical planes drawn parallel to the end lines of the St. Louis Lode mining claim as follows: The northernmost of said planes is drawn so as to intersect the point of intersection of the east side line of the St. Louis Lode mining claim with the west side line of the compromise ground or thirty-foot strip, said point being located on the east side line of the said St. Louis Lode mining claim, south twenty-one degrees fifteen minutes west, distant one thousand thirty-two and seven-tenths feet from corner No. 1 of St. Louis Lode mining claim; the other or southerly of said planes is drawn so as to intersect the west side line of the compromise ground or thirty-foot strip, at a point one hundred and eight feet south, fifty degrees fifty minutes west from the point of intersection of the east side line of the St. Louis Lode mining claim, with the west side line of the compromise ground or thirty-foot strip hereinbefore referred to, including the whole of said vein, ledge or lode included between said vertical planes on its dip throughout its entire depth, although the same may depart beyond the vertical planes passed through the side lines of the St. Louis Lode mining claim.

51 And that you are about to and threaten to mine and extract the ores, minerals, quartz, rock and earth therein contained, and to remove the same and to convert it to your own use.

Now, therefore, you, the said Montana Mining Company, Limited, your agents, attorneys, servants, employés and workmen and each and every of you, are strictly commanded and enjoined, under the pains and penalties which may fall upon you, and each of you, in case of disobedience, that you forthwith, and until the further order, judgment and decree of this court, desist from entering into and upon the said lode, vein or ledge, between the planes aforesaid, or any part thereof, although the same may in its dip pass beyond a vertical plane drawn through the side lines of St. Louis mining claim, or from working, mining or removing any ores, quartz, rock or mineral therein contained, or disposing of, treating and reducing any ores heretofore removed or extracted from said premises.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of this court, the twelfth day of December, 1898, and in the one hundred and twenty-third year of the Independence of the United States of America.

[SEAL.] GEORGE W. SPROULE, *Clerk.*

UNITED STATES MARSHAL'S OFFICE, *District of Montana.*

I hereby certify that I received the within injunction on the fourteenth day of December, 1898, and personally served the

52 same on the fourteenth day of December, 1898, on Montana Mining Company, Limited, by Alex Burrell, general man-

ager of said defendant company named therein, personally, at Marysville, in county of Lewis & Clarke, in said district, by delivering to and leaving with each of said defendants a copy thereof, together with a copy of the complaint duly certified.

Helena, Dec. 15, 1898.

J. P. WOOLMAN,
United States Marshal,
By M. H. HALL, *Deputy.*

(Title of Court, Title of Cause.)

Order Modifying Temporary Injunction.

This cause coming on this day to be heard, on the application of defendant for a modification of the temporary injunction order heretofore issued in the said cause, so as to permit the timbering of a drift run by the defendant into what is known as the compromise ground at the bottom of the plaintiff's winze, near its eighty-five-foot level, and also so as to permit the defendant to remove and store the ore taken from the said compromise ground now in the defendant's chutes, supported by the affidavit of William M. Phillpotts, and it appearing therefrom that the modification asked for should be granted, and everything being fully understood and considered.

Now, therefore, it is ordered and decreed that the said temporary injunction order heretofore issued in the said cause on November 19, 1898, be and the same is hereby modified so as to permit the said defendant company to timber, in a good and substan-
53 tial manner, the drift run by the said defendant for a distance of about twenty-eight feet southerly from the south end of plaintiff's winze, at or near its eighty-five-foot level, so as to prevent the hanging wall of the vein at said point from caving in, and to preserve the said drift from injury from caving.

And it is further ordered that the said injunction order be further modified so as to permit the defendant company to remove, from the chutes running from the above-described drift down to the defendant's four-hundred-foot level, the ore now contained therein as set forth in said affidavit, and to store the same in a safe and convenient place where the same shall be always subject to the further order of this court, and that upon removing the said ore the defendant shall file with the clerk of this court a true and correct statement of the amount of ore so removed, and the place where the same is stored.

It is further ordered that the said temporary injunction order, subject to the foregoing modification, be and the same is hereby continued in force until the further order of this court.

Dated November 26, 1898.

HIRAM KNOWLES, *Judge.*

Defendants called and had sworn DAVID HERRON, a witness of lawful age, who testified as follows:

I reside at Marysville. I am surveyor for The Montana Mining Company, Limited, the defendant. I am familiar with the works of the Montana Mining Company in and about the points
54 where the one hundred and eight foot line crosses the compromise ground, and I am familiar with those portions of the ground testified to by the witness Keerl and the witness Parks as blocks 8, 9, 10 and 11. I have made a survey of the ground and a map of it.

Whereupon the witness produced map marked Defendant's Exhibit No. 3, which said map was offered and received in evidence, and is as follows, to wit (here insert map):

The portions colored blue in the longitudinal section are the stopes of the defendant, and those colored red are the stopes of the plaintiff. The line A B is the projected end line drawn parallel to the end lines of the St. Louis claim. The line C D is the projection of the west boundary line of the thirty-foot strip. The portion of the map left not colored is the ground not stoped.

Defendant likewise called and had sworn one C. W. GOODALE, a witness of lawful age, who testified as follows:

I am by profession a mining engineer. I am at present superintendent of the smelter of the Boston & Montana Company at Great Falls. I am familiar with the ground here in controversy. I first visited the Nine Hour workings in April and May, 1893. I first saw the Montana Company's apex shaft in June, 1893. At that time it was about thirty or thirty-five feet deep. At the time I first saw it no connection had been made with the plaintiff's twenty-foot level, but when I saw the ground again about the twenty-first of September the level had been driven into the shaft and a brattice or bulkhead had been put in on the westerly line of the com-
55 promise ground. I have gone down the apex shaft to the lower workings upon the compromise strip and upon the Nine Hour at different times. I was in the one hundred and ninety-foot level in April or May, 1893. On my return from the East, about the twentieth of September, the drift in this level had been extended about thirty-five or forty feet north from where it was when I first saw it. It was the ordinary size of a mining drift—about seven feet high and four and a half or five feet wide. I examined the material which came out of that drift. It was a very low-grade quartz or vein matter, carrying no copper stain. There was no stoping done in the level, but a little overcutting was done and timber put in to prevent it from caving. I was in this level a few days since. There was quartz in the back of the drift, a very low-grade looking material. There would be no difficulty in getting a sample from it of the material in the drift, and the material that could be obtained would be a fair average sample of what came out of the drift. The pay chutes in the Drum Lummon trend in a southerly direction. A sample taken from a point in the winze one hundred feet above the one hundred and ninety foot level would

not fairly represent the material taken out in running the level. It would be in much higher-grade ore. At the point where Prof. Parks says he took the sample, the ore is of high grade, while in the one hundred and ninety foot level it was poor.

56 Cross-examination:

I made the affidavit which you now show me sworn to on September 23d, 1893. I made this statement: "I have made a careful examination of the stoping done by the said Montana Company, Limited, and its predecessor in interest in the Nine Hour ground, and while there is no direct connection between the said stoping and the said shaft, called the Montana Company's apex shaft, I am quite satisfied that no ore has been stoped from any ground lying to the north of the line drawn through a point where the strike of said lode probably crosses said compromise line, parallel with the south end line of plaintiff's said St. Louis Lode mining claim." The point at which I testified according to this affidavit that no work was done would be north of where the line goes out now. The point where I thought the vein passed out at that time was twenty feet, more or less, from the Montana Company's apex shaft and to the north of the one hundred and eight foot line as now drawn down.

Redirect examination:

I last examined block 9 on the seventh of August, this week. I climbed up from the eighty-five-foot level and above the forty-six. I climbed up on the brattice and caved ground and identified the top of this brattice which has been described. I climbed up to the surface, and it is my opinion that the block called block No. 9 has not been removed; that it is sti-l there. There is certainly a
57 triangular piece of ground or cone there. I climbed up to the surface and identified the brattice described, and from what I have seen on the north side of the Montana Company's apex shaft I do not believe that material was used. I think the pillar of ground above the twenty-foot level of the St. Louis Company and between the red stope shown on the Montana Company's map on the apex shaft and extending to the face has not been removed.

Defendant also called and had sworn ALEXANDER BURRELL, a witness of lawful age, who testified as follows:

I am a miner. I have been engaged in that business for about twenty-five years. I have been connected with the Drum Lummon since 1888. I was mine superintendent up to April, 1897, since which time I have been manager. We commenced sinking the Montana Company's apex shaft on the first day of June, 1893, and sunk it down to a depth of about thirty-five feet, when we were obliged to stop from the fact that the St. Louis Company's eighteen-foot drift was approaching so near that the shots made it not safe to work in the shaft. On the twenty-fifth of June they broke through into our apex shaft. We then stopped them from coming in, and

after they had knocked a hole through we put in a brattice within about a foot of the line. We left about a foot to be sure. We also put in two short stulls. That is all the stoping we did there, and we left the material in the bottom of the shaft and on the floor of the drift. At that time no stoping of the ground had been done
58 by the Montana Company, or by anybody, north of the apex shaft along the line of the compromise ground. I have had continuous control of the operations of the property since and no ore has been removed by anybody over whom I had control north of the apex shaft and within the ground which plaintiff calls its block No. 9. The ground has caved in and dropped into the stope, part on one side of the line and part on the other. I think the greater part is on plaintiff's forty-six-foot level. No ore has been taken by either of the companies with which I have been connected out of what plaintiff claims as block No. 9. In block No. 8 we commenced work immediately after the decision of the Supreme Court of the United States granting us the title to that strip of ground with all the mineral therein contained, which was about a year ago—probably in October or November last. I do not know whether we worked any ore from blocks No. 8 and 11 prior to the service of the injunction. That would have to be determined by the amount left in the upraise that is not taken out, but I have estimated that possibly we milled forty or fifty tons of that ore before the order reached us. The ore that was in the chute we were allowed to remove and bring to the surface, and I have rendered a statement of that ore to this court. There was about sixty tons of it. The balance of the ore that came out of blocks 8 and 11 is in the upraise above the one hundred and ninety foot level. It is in the St. Louis winze sunk from their forty-six-foot shaft to the eighty-five-foot, as continued down by us. The ore is in that winze lying along the bottom of the drift or raise—it is about half full.
59 Block No. 10 was driven by us at the time the St. Louis Company sunk its winze from the forty-six-foot level. We could hear them working from the stope, and, not knowing what their intentions were, we started this level out to intercept them. The work of driving this level was stopped on the thirtieth day of August, 1893. The level as driven in what is called block No. 10 was of a regular size—six and a half or probably seven feet and a half by five or six feet in width. I saw the material that came out of there every day. It had no mineral value, and was not worked in the mill. It was put into the level just south of our main Nine Hour shaft. I never saw a particle of copper stain in it. The ore in the Drum Lummon mine trends to the south. Starting at the top and going at right angles to the dip the ore would decrease in value as you go deep. I have heard the testimony of Mr. Parks about taking a sample in the winze one hundred feet above block 10. A sample taken out of that point would not represent the value of the ore taken out of the level, by any means. You might as well go across the range and get a piece of ore as to go there, because of the character of the ground. The trend of the ore body is to the south and the stopes on the one hundred and ninety foot level as

you go northerly leave the pay ore. There is no pay ore over the back of the level at the edge of tke stope. The material that is in the level now is similar to that taken out, and you can get from block 10 an average of what was taken out. The back of the level should be a better grade really than the entire material taken
60 from the drift, because the top is nearer the bottom of the southern trend than the bottom of the drift, corresponding to its height *h*. There has never been any stoping done in that part of the one hundred and ninety foot level known as block 10. The custom is to take out samples every morning from all places where they are working in the mine, tie them up and mark them and send them to the assay office to know whether ore or waste; there was no exception in this case.

Cross-examination:

The material that came out of block 10 was deposited probably one hundred and eighty or two hundred feet south of the point in the level where it came out. That part of the mine has caved and it probably went down in the waste cave or old original stope. We carried the ore from block No. 10 to the south of the Nine Hour shaft; it is caved down into the works of the Nine Hour. The same disposition was made of the material that came out of block 11 as that which came out of block 8. I know where the two-hundred-foot raise is. We did not stope to the north at that point.

Defendant also called and had sworn JOHN HERRON, a witness of lawful age, who testified substantially as follows:

I am a civil engineer by occupation. I have followed that business for about twenty years. I was for five and a half years at Marysville in the employ of the Montana Mining Company.
61 While there I became acquainted with the mining claims in controversy. I know the Montana Company's apex shaft, plaintiff's twenty-foot level, and I know that the apex of the Drum Lummon lode is at that point. There has been no work done by the Montana Company above the twenty-foot level north of its apex shaft, unless it was a little timbering. There was no stoping done there and no ore taken out there. I am acquainted with the one hundred and ninety foot level in defendant's ground. While the level was being run northerly from the one hundred and eight foot line I was in it nearly every day. The material which came out was waste, and was carried south into the level and dumped in the bottom of the drift. None of it was worked.

Defendant also called and had sworn one WILLIAM M. PHILLPOTTS, a witness of lawful age, who testified substantially as follows, to wit:

I am a mining engineer. I have been with the defendant company for the last five years. I am acquainted with the one hundred and ninety foot level. It is about thirty-five feet long; about twenty-seven or twenty-eight feet of it at the north end is open. The southerly ten or twelve feet of it is filled up. I gained access to it

from plaintiff's eighty-five-foot level. I went down the raise from that level into the one hundred and ninety foot level. There is quartz and vein matter in the back of the level. I took a sample of it, or rather I took six samples. I took the first one twenty-three feet south of the north face. The second one is a sample of
62 the pile of ore that lies in the drift; the third one is a sample taken sixteen feet south of the north face; the fourth one about twelve feet south of the north face, and the fifth one is six feet south of the north face, and the last one is a sample of the face.

(Here the witness produced the samples for exhibit to the jury.)

I am an assayer and I assayed these samples. No. 1 assayed .12 oz. in gold and 1.6 oz. in silver—value in gold, $2.48; silver, $.96; total, $3.44. No. 2 contained .11 oz. in gold and 1.9 oz. in silver; total value, $3.41. No. 3 contained .12 oz. in gold, 1.5 oz. in silver; total, $3.38. No. 4, trace of gold and .7 oz. silver; total value, $.42. No. 5, a trace of gold and 1.5 silver; total value, $.30. No. 6, .02 oz. gold and .8 oz. silver; total value, $.89.

I heard the testimony of Mr. Parks and heard him describe the point from which he took the sample that he assayed as a sample of the contents of this block No. 10. It would not represent the value of that block at all, as it is not taken anywhere near that point.

Thereupon defendant rested.

Rebuttal:

The plaintiff thereupon offered in rebuttal the complaint and exhibit attached thereto, the answer the findings and judgment of the court in the case in the district court of the first judicial district of the State of Montana, wherein the Montana Mining Company, Limited, was plaintiff and the plaintiff herein was defendant,
63 which papers have been offered in evidence heretofore in this case and marked Plaintiff's Exhibit No. 2, are as follows, to wit:

(Title of Court, Title of Cause.)

Complaint.

The plaintiff complains of the above-named defendants and for cause of action alleges:

I.

That this plaintiff is an incorporation duly organized and existing by and under the laws of the Kingdom of Great Britain, and is doing and entitled to do business in the State of Montana, by virtue of its compliance with the laws of this State regulating foreign corporations.

That the above-named defendant, The St. Louis Mining & Milling Company of Montana, is and was at the several dates hereinafter mentioned likewise an incorporation organized and existing by and under the laws of said State of Montana.

II.

And the plaintiff further shows and alleges that on and prior to the seventh day of March, A. D. 1884, plaintiff's predecessors in interest, to wit, one William Robinson, James Huggins and Frank P. Sterling, Warren De Camp and John W. Eddy, who were then and there all citizens of the United States and duly qualified mineral-land claimants, were the owners of, in possession of, and law-
64 fully entitled to the use, occupation and possession of all and singular that piece or parcel of mining ground, comprising a portion of the Nine Hour Lode mining claim, situate, lying and being in Ottawa (unorganized) mining district, in the county of Lewis & Clarke, and State of Montana, more particularly described as follows, to wit:

Commencing at a point from which the center of discovery shaft of the Nine Hour lode bears south 39 degrees, 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence north 50 degrees, 28 minutes east, on a line parallel to the aforesaid boundary line of the St. Louis Lode claim, between corners two and three, two hundred and twenty-six feet to a point on the boundary line of the St. Louis Lode claim, between corners one and two; thence 20 degrees and 28 minutes west along the line of said boundary, between corners one and two, 60.5 feet to corner No. 2; thence 408 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the line of boundary of said St. Louis Lode claim, between corners three and four, thirty feet distant to a point; thence north 50 degrees 28 minutes east along a line parallel to the boundary line of the St. Louis Lode claim, between corners two and three, 230 feet to the point of beginning, including an area of about 12,884.5 feet, together with all the mineral therein contained; that thereafter, in causing to be surveyed for a patent his St. Louis Lode mining claim, the above-named defendant, Charles Mayger, had
65 wrongfully extended, and caused to be extended, the easterly boundary line of his said mining claim over the premises so above mentioned and particularly described, which said premises were then, and ever since the twenty-sixth day of July, 1880, have been, a part of the Nine Hour Lode mining claim, so the property of the aforesaid predecessors in interest of this plaintiff, and of which said portion and of the whole of said mining claim they were then and there the owners, in the actual possession and entitled to the possession thereof. And thereupon said defendant, Charles Mayger, having wrongfully made application in the United States land office at Helena, Montana, to enter said premises as a part and portion of his said St. Louis mining claim, the said Robinson and Huggins duly made and filed in said land office a protest and adverse claim thereto, and thereafter and within the time allowed by law for such purpose, they commenced an action in the district court of the third judicial district of the Territory of Montana, within and for the county of Lewis & Clarke, to determine the right to the possession of said premises. In the said action so commenced as aforesaid the said

William Robinson and James Huggins were plaintiffs and the above-named defendant, Charles Mayger, was defendant therein, and the said court had jurisdiction to determine the subject-matter of said action; that thereupon, and on the seventh day of March, A. D. 1884, to settle and compromise the said suit and adverse claim and for the purpose of settling and agreeing upon the boundary line between the said Nine Hour Lode mining claim and the said
66 St. Louis mining claim, the said defendant, Charles Mayger, made, executed and delivered to said Robinson, Huggins and Sterling a certain bond for a deed in writing, whereby, in consideration of the compromise and settlement of said lawsuit and the withdrawal of said protest and adverse claim in the said land office, so that he might procure a United States patent, he thereby covenanted and agreed that when he should obtain such patent, and on demand of the said William Robinson, James Huggins and Frank P. Sterling, or their heirs or assigns, he would make, execute and deliver to them, their heirs or assigns, a good and sufficient deed of and for all the premises so above particularly mentioned and described, a copy of which said bond for a deed is hereunto annexed marked Exhibit "A," and hereby made a part of this complaint.

III.

And plaintiff further shows and states that thereupon the said Robinson and Huggins dismissed their said suit in said district court, withdrew their said adverse claim in said land office, and duly performed on their part all of the terms and conditions of said contract to be by them kept and performed; that the said Charles Mayger thereupon proceeded with his application to enter said St. Louis mining claim, and thereafter an United States patent was duly issued to him for said St. Louis Lode mining claim as surveyed, and included therein that portion of the Nine Hour Lode mining claim above particularly mentioned and described, but no notice
67 was given to this plaintiff or any of its predecessors in interest of the issuance of said patent, until on or about the — day of November, 1889. That upon the execution of said bond for a deed the said predecessors in interest of this plaintiff were in possession of the premises above mentioned and described, and they and their successors in interest ever since have been and yet are in the possession thereof, holding, using and enjoying the same as a part and portion of said Nine Hour Lode mining claim.

IV.

And plaintiff further shows and states that by mesne conveyance the title to the said Nine Hour Lode mining claim and the whole and every part thereof, including the portion thereof above particularly mentioned and described has come to it, and it is now the owner thereof and in the possession and entitled to the possession of the whole and every part of said Nine Hour Lode mining claim; that being so the owner of said mining claim, and being so entitled to a conveyance of the portion thereof above particularly mentioned and described, this plaintiff, on or about the — day of July, A. D.

1893, demanded of and from the said defendants that they make, execute and deliver a good and sufficient deed to it of and for the premises above mentioned and described, in compliance with the terms and conditions of the said bond, no demand for the execution of said deed having been previously made by said plaintiff or
68 any of its predecessors in interest; but the said defendants then and there refused and ever since have neglected and refused to make, execute or deliver said deed, though often requested so to do.

V.

And plaintiff further shows and states that not only has the said defendant, Charles Mayger, refused and declined to comply with the request of the plaintiff that he make and execute to it a deed for the said premises above particularly described, as in and by said bond for a deed he covenanted and agreed to do, but on or about the tenth day of June, A. D. 1893, for an alleged consideration of one thousand dollars, he made, executed and delivered — of and for said premises to the said defendant, the St. Louis Mining & Milling Company of Montana, but plaintiff avers that at the date of the execution of said deed the said defendant, The St. Louis Mining & Milling Company of Montana, had full knowledge and notice of the making, execution and delivery of the said bond for a deed by its said codefendant and of the rights and equities of plaintiff thereunder as being the successors in interest of the said Robinson, Huggins, Sterling and its other grantors.

And plaintiff further alleges that the said defendants have conspired and confederated together for the purpose of cheating, wronging and defrauding this plaintiff out of the said premises, and to that end the said defendant and the St. Louis Mining & Milling Company of Montana has instituted a number of suits in the circuit court of the United States within and for the district of
69 Montana, in which it claims that it is the owner of the premises above particularly described by virtue of the deed so wrongfully and fraudulently made, executed and delivered to it by its said codefendant, as aforesaid, and in which said actions it claims the right to recover large sums of money for ores therein alleged to have been wrongfully mined from said premises by this plaintiff; that in order to successfully defend itself against said suits and in order to remove the cloud from plaintiff's title to said premises caused by the execution of the said deed to the said defendants, The St. Louis Mining & Milling Company of Montana, it is necessary that the said defendants should be compelled to make, execute and deliver to this plaintiff a deed for the said premises, as in equity and good conscience they ought to do.

Wherefore, the premises considered, plaintiff prays that by the proper order or decree of this court the said defendants be adjudged and decreed to make, execute and deliver to plaintiff a good and sufficient deed for the said premises above mentioned and described, and that in the event of their failure so to do the decree of this honorable court may have the force and effect of such deed; that

plaintiff may have such other and further relief as may be in accordance with equity and good conscience, and that it have judgment for its costs.

M. KIRKPATRICK AND
CULLEN & TOOLE,
Plaintiff's Attorneys.

Duly verified by Jos. K. Toole, as attorney, on September 5, 1894, before W. E. Cullen, Jr., notary public, Lewis & Clarke county, Montana.

70 EXHIBIT "A."

Mayger
to
Robinson *et al.* } Deed.

Know all men by these presents: That I, Charles Mayger, am held and firmly bound unto William Robinson and James Huggins and Frank P. Sterling in the sum of fifteen hundred dollars, for the payment of which, well and truly to be made, I hereby bind myself, my heirs, executors, administrators and assigns, firmly by these presents.

Sealed with my seal and dated this seventh day of March, A. D. 1884.

The consideration of this obligation is such that, whereas, a certain cause now depending in the district court of the third judicial district, Lewis & Clarke county, Montana, between William Robinson and James Huggins, plaintiffs, and Charles Mayger, defendant, has been compromised and settled, and the said William Robinson and James Huggins have agreed to withdraw certain objections to the application of the said Charles Mayger for patent now pending in the United States land office at Helena, Montana.

Now, then, in consideration thereof, and the further consideration of one dollar to the said Charles Mayger in hand paid by the said William Robinson and James Huggins and Frank P. Sterling, the receipt of which is hereby confessed, hereby covenants, promises and agrees to proceed at once upon his application now pending in
the United States land office at Helena, Montana, for a
71 patent to the St. Louis lode claim described therein and
situated in Lewis & Clarke county, Montana Territory, and procure as soon as practicable a Government patent therefor, and when such title shall have been procured according to such application said Charles Mayger hereby covenants, promises and agrees, upon the demand of the said William Robinson and James Huggins and Frank P. Sterling, or their heirs or assigns, to make, execute and deliver to the said William Robinson, his heirs or assigns, a good and sufficient deed of conveyance of that certain lot, piece or parcel of mining ground situated in Lewis & Clarke county, Montana Territory, and comprising a part of two certain quartz lode mining claims known as the St. Louis Lode claim and the Nine

Hour Lode claim, and particularly described as follows, to wit: Commencing at a point from which the center of discovery shaft of the Nine Hour lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners 2 and 3, 50 feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the said St. Louis Load claim, between corners 2 and 3, 226 feet to a point on the boundary line of the St. Louis lode, between corners 1 and 2; thence south 20 degrees 28 minutes east along said boundary, between corners 1 and 2, 60.6 feet to corner No. 2 of the St. Louis lode, 40.031 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the boundary of St. Louis lode, between corners 3 and 4, 30 feet to a point; thence north
50 degrees 28 minutes east along the line parallel to the
72 boundary line of the St. Louis lode, between corners 2 and 3,
230 feet to the point of beginning, including an area of about 12,844.50 sq. ft., together with all the mineral contained therein; and if the said Charles Mayger, his heirs or assigns, shall make, execute and deliver the said deed of conveyance as by this agreement provided and intended, then this bond and agreement to be null and void; otherwise to be and remain in full force and effect.

Witness my hand and seal the day and year first above written.

CHARLES F. MAYGER. [SEAL.]

The name of Frank P. Sterling was inserted in this instrument as one of the obligees before the signing and delivery thereof.

CHARLES F. MAYGER. [SEAL.]

Witness:
J. K. TOOLE.

Duly acknowledged. Filed and recorded March 8, 1884, at 3 a. m.

(Title of Court, Title of Cause.)

Answer.

And now come the defendants herein and for answer to the complaint of plaintiffs:

I.

Admit that the said William Robinson, James Huggins and
Frank P. Sterling, Warren De Camp and John W. Eddy were
73 at the date mentioned in said complaint citizens of the United States and duly qualified mineral claimants, but on their information and belief deny that they were or are the predecessors in interest of said plaintiff, or that they were the owners or possessors of the piece, tract or parcel of land in said complaint described, or in the possession or entitled to the possession thereof, or any mineral therein then or at any other time, or that the same was or is a part of the Nine Hour Lode claim, and aver that the same was and is a part of the St. Louis Lode mining claim, designated and known as such, and embraced and included in the United States patent ob-

tained by the said defendant, Charles Mayger, for said St. Louis Lode mining claim, as hereinafter set forth.

Deny that defendant, Charles Mayger, wrongfully or otherwise extended or caused to be extended the easterly boundary line of said St. Louis mining claim over the said described premises or any part thereof, but admit that he caused a survey to be made of the same, and aver that the boundary lines of said St. Louis mining claim as originally located included and embraced the said *locus in quo* and every part thereof at and prior to the location of said Nine Hour Lode claim, and that the said Charles Mayger and his successors in interest hath ever since been, and now are, in the possession of the same and entitled thereto, save and except a small strip thereof occupied by a portion of the ore-house of plaintiff by sufferance of defendants.

And on their information and belief deny that said Charles
74 Mayger wrongfully made application in the United States land office to enter said premises, and aver that the same was and at all times had been a part and portion of the said St. Louis mining claim.

Admit that the adverse claim of Robinson and Huggins was interposed to said application, and that they instituted an action, as in said complaint mentioned, and that said agreement was entered into, but deny that it was for the purpose of settling or agreeing upon the boundary line between the said Nine Hour Lode mining claim and said St. Louis Lode mining claim, and aver that the same was executed to the said Robinson, Huggins and Sterling as a compromise on account of their adverse claim and suit aforesaid, and comprised a part of said St. Louis Lode claim owned and possessed by the said Charles Mayger, and to enable him to obtain a patent for the whole thereof according to said survey, and agreed to convey the same as in said bond set forth.

Defendants admit that by the terms of said bond the said Charles Mayger agreed, after obtaining a patent therefor, on demand of said Robinson, Huggins and Sterling, to make to them, their heirs or assigns, a good and sufficient deed for the premises in said complaint described, and on their information and belief aver that said plaintiff never has acquired or succeeded to the right, title or interest of said Robinson, Huggins and Sterling to said premises or any thereof, by conveyance or otherwise.

Deny that said Exhibit "A," as set forth, is a copy of said bond,
in that it obligates the said Charles Mayger to execute a good
75 and sufficient deed to Robinson alone, and avers the fact to be the said original bond obligated Charles Mayger to execute a deed on demand to said Robinson, Huggins and Sterling, their heirs or assigns, as expressly set forth and alleged in said complaint.

II.

Admit that said Charles Mayger obtained a patent for said St. Louis Lode mining claim, but deny that it contained any portion of said Nine Hour Lode mining claim, and aver that the said plaintiff

and predecessors in interest had full knowledge and notice of the issuance of said patent mentioned, and were all aware and apprised thereof at or about the date of the issuance of the same.

Deny that at the time of the execution of said bond, or at any other time, the said plaintiff or its predecessors in interest were, or ever had been, in possession of said premises or any part thereof, except the small portion aforesaid, or that they or either of them used and enjoyed the same, or any part thereof, except the small portion aforesaid, or that they ever had, held or enjoyed any part thereof as a part of said Nine Hour Lode mining claim.

III.

Admit that the said plaintiff, by mesne conveyances, acquired the title to said Nine Hour Lode mining claims, but deny that the said conveyances or any conveyances to plaintiff embraced or included the premises in said complaint mentioned and described, or any part or portion thereof.

Admit that the said plaintiff demanded of defendants a
76 deed to said premises, as set forth in said complaint, but deny that no demand therefor was ever theretofore made, and aver the facts to be as hereinafter stated.

IV.

Deny that the said defendants, or either of them, had any knowledge or notice that the said plaintiff was the successor in interest of said Robinson, Huggins and Sterling, or either of them, at the time of the making the deed by the said defendant Mayger to his said codefendant, and on their information and belief deny that the said plaintiff is the successor in interest of said Robinson, Huggins and Sterling, or either of them, in said premises so embraced in said Mayger's survey and patent, or any part thereof.

Deny that defendants have combined or confederated together for the purpose of cheating, wronging or defrauding plaintiff out of its right or title to said premises or any part thereof, and aver, as heretofore, that the said plaintiff has not and never had any right or title to said premises, or any part thereof, as successor in interest to any one whomsoever.

Deny that the claim of defendants, or either of them, casts any cloud upon the title of plaintiff, or that it is necessary they or either of them should execute a deed to plaintiff for said premises, or any part thereof, to satisfy the requirements of equity, or for any other cause or reason, and aver that if the said conveyances to plaintiff for said Nine Hour Lode mining claim included said premises as alleged, no such transfer or conveyance is necessary for any purpose.

77 And these defendants, for further answer to the complaint of plaintiff, show unto this honorable court that the said adverse claim aforesaid was interposed for the purpose of harassing and delaying said Mayger from obtaining a patent to said St. Louis mining claim, and that the said bond was executed as a compromise

to avoid the same; all of which was done contrary to equity and good conscience and for the sole purpose aforesaid.

That on the twenty-second day of July, 1887, the said Charles Mayger, grantor of his codefendent, obtained and procured a United States patent for the premises described in his complaint as a part and portion of his St. Louis mining claim in accordance with his possession and the survey had thereof, on account of which he acquired the legal title thereto, and had and held the possession thereof.

That *that* said defendant, The St. Louis Mining & Milling Company of Montana, ascertaining and hearing that the said conveyances to said plaintiff did not comprise the said premises described in plaintiff's complaint, and that it had and held no title thereto, and for the purpose of better securing the possessory title by it had and held, obtained and received the deed from said Charles Mayger mentioned and described in plaintiff's complaint.

And these defendants, for further answer to the complaint of the plaintiff, and in pursuance of section 105, Code of Civil Procedure, Compiled Statutes of Montana, allege generally that the cause of action set set forth in plaintiff's complaint is barred by the provisions of sections 29, 30, 31 and 32, subsection 41, and section
78 47 of said Code of Civil Procedure, and had been so barred at the time of the execution of said deed to said defendant company.

Wherefore, defendants pray this honorable court that if it shall appear the said plaintiff is not the owner of said premises by any of the conveyances mentioned in the said complaint, or the title by it so pleaded, that the same be decreed null and void, and that the right, title and claim of defendant company be decreed superior to the claim of plaintiff in the premises in controversy; that such other and further relief may be had as in equity and good conscience they or either of them may seem entitled, and that they receive their costs and disbursements in this behalf expended.

W. W. DIXON,
McCONNELL, CLAYBERG & GUNN,
TOOLE & WALLACE,
Attorneys for Defendants.

Duly verified. Filed January 2, 1895.

(Title of Court, Title of Cause.)

Finding of Fact by the Court.

I.

That the plaintiff and the defendant, The St. Louis Mining & Milling Company of Montana, are and each of them were, at the date of the commencement of this action, corporations doing business in the State of Montana.

79 II.

That on the seventh day of March, A. D. 1884, William Robinson, James Huggins, F. P. Sterling, Warren De Camp and John W. Eddy were the owners of, in possession and entitled to the possession of all and singular the Nine Hour Lode claim, situate, lying and being in the Ottawa (unorganized) mining district in the county of Lewis & Clarke, State of Montana, and that the strip of ground called the "compromise ground," which is the subject of dispute in this action, was, at that time, and thereafter continued to be, a part of said Nine Hour Lode mining claim.

III.

That prior to the date last aforesaid the said Charles F. Mayger had made application in the United States land office at Helena, Montana, for a patent to the said St. Louis Lode mining claim, and had included in his application the said ground which is the subject of dispute in this action, and that thereupon the said Robinson and Huggins had made and filed in the land office a protest and adverse claim to the ground in dispute, and an action had been instituted within the statutory time to determine the right to the possession of said premises in dispute, and as to who had the right to obtain patent therefor; which said action at said last aforesaid date was pending in the district court of the third judicial district of Montana, within and for the county of Lewis & Clarke; that on the seventh day of March. A. D. 1884, the said Robinson, Huggins and
80 Sterling, and the defendant, Charles F. Mayger, entered into the bond or obligation attached to the complaint herein, marked "Exhibit A," and that said obligation or bond was made and given for the purpose of settling and determining the action aforesaid and the controversies involved therein, and for the purpose of determining and fixing the boundary line between the said Nine Hour Lode mining claim and the St. Louis Lode mining claim owned by the said Mayger, the boundaries of which claims were in conflict aforesaid.

IV.

That thereupon said suit was dismissed and the said adverse claim was withdrawn in said land office, the said Robinson, Huggins and Sterling performing on their part all of the terms and conditions of said contract to be by them performed.

V.

That at the date of the execution of said bond the said Robinson, Huggins and Sterling, Eddy and De Camp were in the actual possession of the said compromise strip, and they and their successors in interest have ever since remained in the possession thereof, claiming and holding the same as a part of the said Nine Hour Lode mining claim.

VI.

That at the date of the execution and delivery of said bond it was expressly agreed between the parties thereto that all of the ground

lying to the east of the westerly line of the compromise strip should be a portion of the Nine Hour Lode mining claim.

81 VII.

That the plaintiff herein is the successor in interest of the said Robinson, Huggins and Sterling, the obligators named in said bond, and it is also the successor in interest of Warren De Camp and John W. Eddy, who were cotenants with said obligeees in said premises at the date of the execution of said bond.

VIII.

That the conveyances introduced in evidence on the part of the plaintiff embrace and were intended to include the said compromise ground, and conveyed to the respective grantees therein named all the interest, legal and equitable, which the said grantor or grantors had in said premises at the date of the execution thereof, and it was the intention of the parties to the deeds to convey as well their interest in said compromise strip as every other part and parcel of the said Nine Hour Lode mining claim.

IX.

That on or about the — day of July, A. D. 1893, the said plaintiff, as the assignee of the said Robinson, Huggins and Sterling, duly demanded a deed of the said compromise strip of ground of and from said defendant, but the said defendant refused to execute such deed, and that no demand for such deed had ever previously been made upon the said Charles F. Mayger by the said plaintiff or any of its predecessors in interest.

82 X.

That on or about the tenth day of June, A. D. 1893, the defendant, Charles F. Mayger, assumed to convey the said compromise strip to his codefendant, The St. Louis Mining & Milling Company of Montana, but at the date of said conveyance, the said defendant, The St. Louis Mining & Milling Company of Montana, had full notice and knowledge of the equities of the plaintiff in and to said compromise strip and its possession thereof.

XI.

That the defendants wrongfully assert title to the ground in controversy, and thereby cloud the title and estate of plaintiff therein, and that plaintiff has a right to have such cloud removed from its title to the premises in controversy.

XII.

That the court finds all of the issues raised by the pleadings in this case in favor of the plaintiff and against the defendants.

Conclusions of Law.

I.

The plaintiff is entitled to a conveyance from the said defendant of and for the premises particularly mentioned and described in the said bond, known as the "compromise ground."

83 II.

That the said defendants, and each of them, should be enjoined and perpetually restrained from asserting any right, title or interest of any kind or character in or to the said compromise ground, or any part or portion thereof, and from in any manner interfering with the possession or enjoyment thereof by plaintiff.

Dated June 1, 1895.

HORACE R. BUCK, *Judge.*

(Title of Court, Title of Cause.)

Judgment.

This cause came regularly on to be tried on the tenth day of May, A. D. 1895, Charles J. Hughes, Jr., M. Kirkpatrick, and Cullen & Toole appearing for the plaintiff, and Messrs. W. W. Dixon, Toole & Wallace and McConnell, Clayberg & Gunn appearing for the defendants. A jury having been expressly waived by the parties, the issues raised by the pleadings herein were tried to the court sitting without a jury, and after the introduction of testimony on the part of the plaintiff and on the part of said defendants, and the argument of counsel, and after due deliberation, the court having made and filed on the first day of June, 1895, its findings of fact and law in said case, and the issues having been found in favor of the plaintiff and against the defendants, and that the plaintiff is the owner

84 of the equitable and entitled to the conveyance from the defendants of the legal title to the premises mentioned in the complaint and hereinafter described.

Now, therefore, on motion of counsel for plaintiff, it is

Ordered, adjudged and decreed that the agreement set forth in the complaint herein, a copy whereof is attached to said complaint as an exhibit, be specifically performed, and that the defendant, The St. Louis Mining & Milling Company of Montana, within thirty days from and after the entry of this decree, execute and deliver to said plaintiff a good and sufficient conveyance in fee-simple absolute, free from all encumbrances, of and for the premises mentioned in the complaint and hereinafter described. The said conveyance shall be in form like the one hereunto annexed, and, upon the failure of said defendant within the time aforesaid so to make, execute and deliver such conveyance, then the clerk of this court is hereby appointed a commissioner, who, in the name and for and on behalf of said defendant, The St. Louis Mining & Milling Company of Mon-

tana, is hereby directed to execute a deed to said plaintiff for said premises, which, after reciting that it is executed by said clerk as such commissioner for and on behalf of said defendant, shall be in form substantially like the one heretofore attached and approved, and, upon recording a duly certified copy of this decree, and of the said deed so executed by the said commissioner, in the office of the county recorder of the county of Lewis & Clarke and State of Montana, the same shall have the force and effect of a conveyance of
the said title from said defendants to the said plaintiff; that
85 the said defendants and all persons claiming under them or
either of them be forever barred from all interest or claim to the said premises, or to any part or portion thereof, or to the possession of the same or any thereof.

The premises affected by this decree and so to be conveyed are more specifically bounded and described as follows, to wit:

Commencing at a point from which the center of discovery shaft of the Nine Hour lode bears south 39 degrees and 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode claim, between corners two and three, two hundred and twenty-six (226) feet to a point on the boundary line of the St. Louis Lode claim, between corners one and two; thence south 20 degrees 28 minutes west along the line of said boundary, between corners one and two, 60.5 feet to corner No. 2; thence 403 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the line of boundary of said St. Louis claim, between corners three and four, thirty feet distant to a point; thence north 50 degrees 28 minutes east along a line parallel to the boundary line of the St. Louis Lode claim, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.5 feet, together with all the mineral therein contained.

It is further ordered and adjudged that the plaintiff do have
86 and recover from the said defendant its costs in this behalf
sustained, taxed at the sum of — dollars.

And that the plaintiff have execution therefor.

June 1, 1895.

HORACE R. BUCK, *Judge.*

To which the defendant objected for the reason that the same was not in rebuttal of anything proven or offered to be proven on the part of the defendant in this case, and for the further reason that the evidence was not material to any issue made by the pleadings in the case; that there being no ambiguity in either the bond or deed attached as an exhibit to defendant's answer herein, there was nothing for the court to construe.

It was stipulated by counsel for both parties that any objection to such papers based upon the ground that the same were not certified to or authenticated as required by law should be waived.

But the court overruled such objection. To which ruling of the

court the defendant then and there excepted, and the papers were admitted in evidence for the purpose of enabling the court to construe the deed, and marked "Plaintiff's Exhibit No. 2." The deed referred to in the judgment is in the same form as the copy of the deed in the answer of the defendant, and is omitted for sake of brevity.

And the foregoing being substantially all of the evidence given or offered to be given in said cause, and both parties having rested, the defendant asked the court to instruct the jury as follows:

87 "The parties to this action having by agreement settled the boundary-line between their two claims by establishing the western side line of the compromise ground as such boundary line, and the plaintiff having conveyed by deed the said compromise ground to the defendant, you are instructed that you cannot find a verdict for the plaintiff for any ores except such as you find were taken out north of a line drawn down from the point of intersection of the westerly boundary line of the compromise ground, with the easterly boundary line of the St. Louis lode, parallel with the end lines of the said St. Louis lode and lying between said lines and the northerly projected end line, as claimed in the complaint."

But the court would not and did not give such instruction, but marked the same "Refused," to which ruling of the court the defendant then and there duly excepted.

Thereupon the defendant requested the court in writing to charge the jury as follows, to wit:

"The plaintiff having heretofore conveyed to the defendant the strip of ground known as the thirty-foot strip or compromise ground, describing the same by metes and bounds, and by such deed having conveyed the same, together with all the minerals therein contained, and it not appearing that such deed was obtained by any fraud practiced by the defendant upon the plaintiff, you are instructed that in and by such deed the plaintiff is now estopped from claiming any mineral whatever, which was or is contained in said compromise ground, and this without regard to where the lead, in which said mineral has been, is, or may be found, has its apex.

88 The court instructs you that the plaintiff in the action can only recover for such mineral-bearing quartz rock and ore as you shall find the defendant has mined, taken and converted to its own use, lying east of the east line of the compromise ground and between the lines mentioned in the complaint, whereat the plaintiff asks to have projected lines drawn down parallel to the end lines of its St. Louis claim."

But the court would not and did not give the said instruction, but marked the same "Refused," to which ruling of the court in refusing to give such instruction the defendant then and there duly excepted.

The defendant further thereupon requested the court in writing to charge the jury as follows, to wit:

"If you believe from the testimony in this case that the defendant, though it mined the ore in what the plaintiff has designated as

blocks 8 and 11, has not converted the same, but yet has such ore ready to deliver to said plaintiff should this court finally decide the plaintiff to be the owner thereof, you cannot include the same or the value thereof in any verdict you may render for the plaintiff. Such ores as are thus held under and subject to the order of this court have not been converted by the defendant."

But the court would not and did not give such instruction, but marked the same "Refused," to which ruling of the court the defendant then and there duly excepted.

The defendant further requested the court in writing to instruct the jury as follows, to wit:

"You are instructed that this is an action for damages occasioned by trespass, and the taking and carrying away of
89 ore. To maintain this action the plaintiff must have been in the possession of the premises and the place of trespass at the time of the commencement of this action and at the time of trial, and the burden of proof was upon the plaintiff to show such possession. The plaintiff has failed to introduce any evidence of such possession, except such as arises by operation of law from the possession of the apex of the vein from which the ore is alleged to have been extracted. This is termed constructive possession. On the other hand, the evidence is clear and uncontradicted that the defendant had and still has actual possession of the surface ground from underneath which the ore was extracted, if any has been shown to have been extracted by the defendant company, and possession of the place of trespass. Under this state of circumstances the plaintiff is not entitled to recover in this form of action, and your verdict will be for the defendant."

But the court would not and did not give the said instruction, but marked the same "Refused," to which ruling of the court and its refusal to give such instruction the defendant then and there duly excepted.

The defendant further requested the court in writing to instruct the jury as follows, to wit:

"You are instructed that in this case the burden of proof is upon the plaintiff to make out by a preponderance of the testimony every fact material to its cause of action. It must not only show that ore
has been taken by the defendant, of which it is the owner,
90 but before it can be entitled to recover it must show the market value of the ore so taken, and, in determining the value of the ore so taken, you are instructed that the plaintiff is entitled to the value of the ore as it stood in the mine; and in estimating this value you will take into consideration whether or not the ore as it stood in the mine was of sufficient value to pay the cost of extraction and of milling and reducing it to bullion in the ordinary method of reducing such ores in the vicinity where the ore was taken; and if, from the evidence, you find that the ore so taken by the defendant, if you find any was taken, was not of sufficient value to pay the cost of such extraction and reduction, then the plaintiff is not entitled to recover for such ore."

But the court would not and did not give the said instruction,

but marked the same "Refused," to which ruling of the court the defendant then and there duly excepted.

And thereupon the court charged the jury, among other things, as follows, to wit:

"Instruction No. 1. The evidence in this case shows that the discovery vein of the St. Louis claim extends substantially from one end line to the other lengthwise of the claim; that it dips to the east and that there is another vein having a section of its apex wholly within the St. Louis claim between the planes known as the 520 and the 108."

To the giving of which said instruction the defendant, before the going out of the jury, objected, for the reason that under the issues the said instruction was irrelevant and immaterial.

91 But the court overruled such objection and gave such instruction, to which said ruling of the court the defendant then and there duly excepted.

And the court likewise, among other things, instructed the jury as follows, to wit:

"Instruction No. 2. In estimating damages, if the jury find that the defendant has prevented the plaintiff from ascertaining the true value of the ore, either by mixing the ore taken from the plaintiff's ground with ore belonging to the defendant, or with any other material taken from any other place, then the jury are at liberty to consider the highest value of ore found in the vicinity of that ore."

To the giving of which said instruction, the defendant then and there objected, for the reason that there was no evidence that the defendant had prevented the plaintiff from ascertaining the true value of any of the ore, and that said instruction was misleading to the jury, and does not correctly state the law applicable to the case therein supposed.

But the court overruled such objection and gave the said instruction to the jury, to which ruling of the court the defendant then and there excepted, and now presents this its bill of exceptions, and prays that the same may be signed, sealed and made a part of the record in this case.

HIRAM KNOWLES, *Judge.*

92 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Order Settling Exceptions.

This cause having been brought on regularly before the court on this twenty-sixth day of August, 1899, upon the application of the defendant, for the settling and certifying of its proposed bill of exceptions, lately filed herein, and the amendments to said proposed bill of exceptions by the plaintiff, and all of said amendments so

far as allowed by this court having been embodied in a transcribed copy of said proposed bill of exceptions, composed of the foregoing pages, numbered 1 to 65 inclusive.

Now, therefore, on motion of Messrs. Cullen, Day and Cullen, the defendant's attorneys, it is ordered that the said proposed bill of exceptions, as amended and transcribed, embraced in the foregoing pages, be and it hereby is settled as the true bill of exceptions for this cause, and that the same as so settled be now and here
93 certified accordingly by the undersigned, the judge of this court, who presided at the trial of this cause, and that said bill of exceptions as so certified be filed by the clerk.

Aug. 28, 1899.

HIRAM KNOWLES, *Judge.*

(Endorsed:) (Title of court and cause.) Bill of exceptions. Filed Aug. 28, 1899. Geo. W. Sproule, clerk.

And thereafter, to wit, on the twenty-eighth day of August, A. D. 1899, a petition for a writ of error was filed herein, being as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendants.

Petition for Writ of Error.

The Montana Mining Company, Limited, the defendant in
94 the above-entitled cause, feeling itself aggrieved by the verdict of the jury and judgment entered on the sixteenth day of August, A. D. 1899, comes now by Messrs. Cullen, Day & Cullen, its attorneys, and petitions the court for an order allowing said defendant to prosecute a writ of error to the honorable, the United States circuit court of appeals for the ninth circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which it shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the d-termination of said writ of error by the United States circuit court of appeals for the ninth circuit, and your petitioner will ever pray.

August 28, 1899.

CULLEN, DAY & CULLEN,
Attorneys for Defendants.

At a stated term, to wit, the April term, A. D. 1899, of the circuit court of the United States of America of the ninth judicial circuit, in and for the district of Montana, held at the court-room in the city

of Helena, on the twenty-eighth day of August, in the year of our Lord, one thousand eight hundred and ninety-nine.

Present: The Honorable Hiram Knowles, circuit judge.

95 ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Order Allowing Writ of Error.

Upon motion of Messrs. Cullen, Day & Cullen, attorneys for the defendant, and upon filing a petition for writ of error and assignment of errors.

It is ordered that writ of error be and hereby is allowed to have reviewed in the United States circuit court of appeals for the ninth circuit, the judgment heretofore entered herein, and that the amount of the bond on said writ of error be and hereby is fixed at twenty-five thousand dollars.

August 28, 1899.

HIRAM KNOWLES, *Judge.*

And on said twenty-eighth day of August, 1899, an assignment of errors was filed herein, being as follows, to wit:

96 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Assignment of Errors.

Comes now the defendant, The Montana Mining Company, Limited, plaintiff in error, by Cullen, Day & Cullen, its attorneys, and says that the record and proceedings in the above-entitled cause show there is manifest error in this, to wit:

I.

That the court erred in overruling the defendant's objection to the introduction of any testimony on the part of plaintiff, for the reason that the second amended supplemental complaint, which had been theretofore read to the jury, did not state facts sufficient to constitute a cause of action, and did state facts showing that the plaintiff had no cause of action.

97 II.

That the court erred in permitting the witness, William Mayger, to testify that the discovery vein of the St. Louis mining claim ran more parallel with the location of the St. Louis Lode mining claim

than in any other direction, for the reason that the said testimony was irrelevant and immaterial, it not being alleged in the complaint that there was any discovery vein in the St. Louis Lode mining claim, and there being no allegation in the complaint as to the course or direction of said vein.

III.

The court erred in admitting any and all of the testimony offered with reference to the discovery vein of the said claim, for the reason that the same was irrelevant and immaterial under the pleadings.

IV.

The court erred in permitting the witness James S. Keerl to testify that the lines representing the planes drawn upon Plaintiff's Exhibit No. 1, were drawn parallel to the end lines of the St. Louis mining claim, for the reason that the same was incompetent and immaterial, it not having been established which were the end lines, or which the side lines of the St. Louis claim.

V

The court erred in permitting the witness James S. Keerl to
98 give the dimensions of blocks 8, 9, 10 and 11, which were situated north of the one hundred and eight foot plane, as shown upon Plaintiff's Exhibit No. 1, and north of the plane intersecting the easterly boundary line of the St. Louis claim, at the point where the westerly boundary of the thirty-foot strip intersects it, for the reason that the same was incompetent, irrelevant and immaterial under the pleadings, it being alleged in the complaint that the defendant was the owner of the ground, known as the "compromise ground," together with all the mineral therein contained, and alleged in the answer that the said "compromise ground" had been conveyed by the plaintiff to the defendant in pursuance of a bond for a deed, describing the compromise ground by metes and bounds and conveying the same to the defendant, "together with all the mineral therein contained," which said bond and deed, being attached as exhibits to the answer, were not denied, but specifically admitted by the replication, and that therefore the plaintiff was estopped from claiming any mineral within the said compromise ground, and it appears in the testimony that the mineral about which the witness was testifying, was within the vertical lines of said compromise ground.

VI.

The court erred in permitting the witness John R. Parks to testify that the discovery vein of the St. Louis claim ran generally parallel to the side lines of said claim, for the reason that there was no issue made by the pleadings relative to the discovery vein of said claim.

99 VII.

The court erred in permitting the witness John R. Parks to testify to the contents of blocks 8, 9 and 10, for the reason that it appeared

from the testimony that the said blocks were in what was designated as the compromise ground, and that under the pleadings the plaintiff was estopped to claim any mineral found therein.

VIII.

The court erred in permitting the witness John R. Parks to testify that the four-hundred-foot level had been used by the defendant in the operation of its mine, for the reason that the same was irrelevant and immaterial, in that this is an action for the recovery of damages for the alleged extraction and conversion of ores claimed by the plaintiff, and not an action to recover for the use of levels constructed by the defendant upon its own property.

IX.

The court erred in permitting the witness Walter Proctor Jenney to testify that the discovery point of the St. Louis Lode claim was connected with a vein called the discovery vein, and in permitting the said witness to describe the said vein, for the reason that the same was immaterial and irrelevant, there being no allegations in the complaint with reference to the discovery vein of the St. Louis Lode mining claim, and no issue in the pleadings with reference thereto.

100 X.

The court erred in admitting in evidence in rebuttal the complaint and exhibits attached thereto, the answer, findings and judgment of the court in the case in the district court of the first judicial district of the State of Montana, wherein The Montana Mining Company, Limited, was plaintiff, and the plaintiff herein was defendant, for the reason that the same was not in rebuttal of anything proven or offered to be proven on the part of the defendant, and for the further reason that the evidence was not material, there being no ambiguity in either the bond or deed, attached as exhibits to defendant's answer herein, and therefore there was nothing for the court to construe.

XI.

The court erred in refusing to give the jury the following instruction requested by the plaintiff in error:

"The parties to this action having by agreement settled the boundary line between their two claims by establishing the western side line of the compromise ground as such boundary line, and the plaintiff having conveyed by deed the said compromise ground to the defendant, you are instructed that you cannot find a verdict for the plaintiff for any ores except such as you find were taken out north of a line drawn down from the point of intersection of the westerly boundary line of the compromise ground with the easterly

101 boundary line of the St. Louis lode, parallel with the end lines of the said St. Louis lode, and lying between said lines and the northerly projected end line, as claimed in the complaint."

XII.

The court erred in refusing to give the jury the following instruction:

"The plaintiff having heretofore conveyed to the defendant the strip of ground known as the thirty-foot strip, or compromise ground, describing the same by metes and bounds, and by such deed having conveyed the same, together with all the mineral therein contained, and it not appearing that such deed was obtained by any fraud practiced by the defendants upon the plaintiff, you are instructed that in and by such deed the plaintiff is now estopped from claiming any mineral whatever, which was or is contained in said compromise ground, and this without regard to where the lead, in which said mineral has been, is, or may be found, has its apex. The court instructs you that the plaintiff in the action can only recover for such mineral-bearing quartz rock and ore as you shall find the defendant has mined, taken and converted to its own use, lying east of the east line of the compromise ground and between the lines mentioned in the complaint, whereat the plaintiff asks to have projected lines drawn down parallel to the end lines of its St. Louis claim."

XIII.

The court erred in refusing to give the jury the following instruction:

102 "If you believe from the testimony in this case that the defendant, though it mined the ore in which the plaintiff has designated as blocks 8 and 11, has not converted the same, but yet has such ore ready to deliver to said plaintiff, should this court finally decide the plaintiff to be the owner thereof, you cannot include the same or the value thereof in any verdict you may render for the plaintiff. Such ores as are thus held under and subject to the order of this court have not been converted by the defendant."

XIV.

The court erred in refusing to give to the jury the following instruction requested by the plaintiff in error:

"You are instructed that this is an action for damages occasioned by trespass and the taking and carrying away of ore. To maintain this action, the plaintiff must have been in the possession of the premises and the place of trespass at the time of the commencement of this action and at the time of trial, and the burden of proof was upon the plaintiff to show such possession. The plaintiff has failed to introduce any evidence of such possession, except such as arises by operation of law from the possession of the apex of the vein, from which the ore is alleged to have been extracted. This is termed constructive possession. On the other hand the evidence is clear and uncontradicted that the defendant had, and still has, actual possession of the surface ground from underneath which the ore was extracted, if any has been shown to have been extracted by the de-

fendant company, and possession of the place of trespass.
103 Under this state of circumstances the plaintiff is not entitled to recover in this form of action, and your verdict will be for the defendant."

XV.

The court erred in refusing to give to the jury the following instruction requested by the plaintiff in error:

"You are instructed that in this case the burden of proof is upon the plaintiff to make out by a preponderance of the testimony every fact material to its cause of action. It must not only show that ore has been taken by the defendant, of which it is the owner, but before it can be entitled to recover it must show the market value of the ore so taken, and in determining the value of the ore so taken you are instructed that the plaintiff is entitled to the value of the ore as it stood in the mine; and in estimating this value you will take into consideration whether or not the ore as it stood in the mine was of sufficient value to pay the cost of extraction and milling and reducing it to bullion in the ordinary method of reducing such ores in the vicinity where the ore was taken; and if from the evidence you find that the ore so taken by the defendant, if you find any was taken, was not of sufficient value to pay the cost of such extraction and reduction, then the plaintiff is not entitled to recover for such ore."

XVI.

The court erred in giving the following instruction during its charge to the jury:

104 "Instruction No. 1. The evidence in this case shows that the discovery vein of the St. Louis claim extends substantially from one end line to the other lengthwise of the claim; that it dips to the east and that there is another vein having a section of its apex wholly within the St. Louis claim, between the planes known as the 520 and the 108."

XVII.

The court erred in giving the following instruction during its charge to the jury:

"Instruction No. 2. In estimating damages, if the jury find that the defendant has prevented the plaintiff from ascertaining the true value of the ore, either by mixing the ore taken from the plaintiff's ground with ore belonging to the defendant, or with any other material taken from any other place, then the jury are at liberty to consider the highest value of ore found in the vicinity of that ore."

Wherefore, the said Montana Mining Company, Limited, plaintiff in error, prays that the judgment of the circuit court of the United States for the district of Montana be reversed, and that the said circuit court be directed to enter an order setting aside the verdict and dismissing the said cause of action.

CULLEN, DAY & CULLEN,
Attorneys for Plaintiff in Error.

(Endorsed:) No. 291. (Title of court and cause.) Petition for writ of error. Order and assignment of errors. Filed August 28, 1899. Geo. W. Sproule, clerk.

105 And thereafter, to wit, on the seventh day of September, 1899, a bond on writ of error was duly approved and filed, being as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Bond on Writ of Error.

Know all men by these presents: That we, The Montana Mining Company, Limited, as principal, and The United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto The St. Louis Mining & Milling Company of Montana, plaintiff above named, in the sum of twenty-five thousand dollars, to be paid to the said St. Louis Mining & Milling Company of Montana, its successors or assigns, to which payment, well and truly to be made, we *find* ourselves and each of us, jointly and severally, and our and each of our successors, firmly by these presents.

106 Sealed with our seals and dated the twenty-ninth day of August, A. D. 1899.

Whereas, the above-named defendant, The Montana Mining Company, Limited, has sued out a writ of error to the United States circuit court of appeals for the ninth circuit, to reverse the judgment entered in the above-entitled cause on the sixteenth day of August, 1899, by the circuit court of the United States for the district of Montana.

Now, therefore, the condition of this obligation is such that if the above-named Montana Mining Company, Limited, shall prosecute said writ of error to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

THE MONTANA MINING COMPANY, LIMITED,
By ALEX. BURRELL, *General Manager.*
THE UNITED STATES FIDELITY & GUARANTY COMPANY,
[SEAL.] By GEORGE L. RAMSEY, *Attorney-in-fact.*

Copy of Resolution.

That whereas, it is often necessary, in order to facilitate the business of the company in States other than Maryland, and in the Territories, to have stipulations, bonds and undertakings given or required in judicial actions or proceedings, executed with the least delay and with promptness;

107 Now, therefore, be it resolved, that the president, or one of the vice-presidents, and the secretary, or assistant secretary, be, and they are hereby authorized, to appoint one or more persons residing in the States other than Maryland, and in the Territories of the United States, to sign the name of the company as surety to, and to execute, acknowledge, justify upon and deliver any and all stipulations, bonds and undertakings, given or required in any judicial action or proceeding within any one of the said States or Territories, and that the said person or persons so appointed are hereby authorized and empowered to sign the name of the company and to affix its corporate seal as surety to said stipulations, bonds and undertakings, and to sign their names thereto in attestation of same, and thereby to lawfully bind the company to all intents and purposes, as if done by its duly authorized officers, and the company, through us, its board of directors, hereby ratifies and confirms all and whatsoever the said person or persons may lawfully do by virtue of the authority hereby vested in them.

I, George R. Callis, secretary of the United States Fidelity and Guaranty Company, do hereby certify that the above and foregoing is a full and correct copy of a resolution passed by the board of directors of the said company at a regular meeting thereof, duly called and held on the eleventh day of July, A. D. 1898, a quorum being present, as the same appears on the records of the company now in my possession and custody as secretary.

In witness whereof, I have hereunto set my hand and affixed

108 the seal of the said company, at the city of Baltimore, Maryland, this seventeenth day of April, A. D. 1899.

[SEAL.] GEORGE R. CALLIS, *Secretary.*

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

I, Joseph W. Chivers, a notary public in and for the county of Lewis and Clarke, State of Montana, do hereby certify that the above and foregoing is a full and correct copy of the power of attorney, granted by the United States Fidelity & Guaranty Company, to George L. Ramsey, under date of April 17, A. D. 1899, together with certificate of authenticity, signed by Arthur C. Pierce, notary public; copy of the resolution by the directors of the United States Fidelity and Guaranty Company, and certificate of authenticity, signed by George R. Callis, secretary. I further certify that the power of attorney was filed in duplicate original, in the office of the

clerk of the supreme court for the State of Montana, and endorsed: "Filed May 18, 1899. Henry G. Rickerts, clerk of the supreme court, State of Montana;" and that it was also filed in the office of the clerk of the United States court, for the district of Montana, and endorsed: "Filed and entered, May 20, 1899. Geo. W. Sproule, clerk of the United States court, for the district of Montana."

109 In witness whereof, I have hereunto set my hand, and affixed my seal, at the city of Helena, Montana, this fifth day of September, 1899.

[SEAL.] JOSEPH W. CHIVERS,
Notary Public in and for the County of Lewis and Clarke, State of Montana.

Power of Attorney Granted to George L. Ramsey by United States Fidelity and Guaranty Company of Baltimore.

Know all men by these presents, that the United States Fidelity and Guaranty Company, a body corporate duly incorporated under the laws of the State of Maryland, doth hereby constitute and appoint George L. Ramsey, of the city of Helena, county of Lewis and Clarke and State of Montana, to be its true and lawful attorney, in and for the State of Montana, for the following purposes:

To sign its name as surety to, and to execute, acknowledge, justify upon, and deliver, any and all stipulations, bonds and undertakings, given or required in any judicial action or proceeding brought or pending within any of the counties of the said State.

It being the intention of this power of attorney to fully authorize and empower the said George L. Ramsey, to sign the name

110 of said company, and affix its corporate seal as surety to any or all of the said stipulations, bonds and undertakings, and thereby to lawfully bind it as fully, and to all intents and purposes as if done by the duly authorized officers of said company, with the seal of said company thereto affixed, and the said company hereby ratifies and confirms all and whatsoever the said George L. Ramsey may lawfully do in the premises by virtue of these presents.

In witness whereof, the said The United States Fidelity and Guaranty Company, pursuant to a resolution of its board of directors, duly passed on the eleventh day of July, A. D. 1898 (a certified copy of which is hereto annexed), has caused these presents to be sealed with its common and corporate seal, duly attested by its president and by its secretary, this seventeenth day of April, A. D. 1899.

THE UNITED STATES FIDELITY AND GUARANTY CO.

[SEAL.]

JOHN R. BLAND, *President.*
GEORGE R. CALLIS, *Secretary.*

[Government revenue 25c. stamp.]

STATE OF MARYLAND, }
City of Baltimore. }

I, Arthur C. Pierce, a notary public, duly appointed and qualified, in and for the city and State aforesaid, hereby certify that on this seventeenth day of April, A. D. 1899, personally appeared
111 before me, John R. Bland, president, and George R. Callis, secretary, of the United States Fidelity and Guaranty Company, to me personally known to be the said officers of the said corporation, and the individuals who executed the foregoing instrument, and they each duly acknowledged the execution of the same as the act and deed of said corporation; and being by me each duly sworn severally and each for himself, did depose and say that they are the said officers of the said corporation, and that the seal affixed to the foregoing instrument is the corporate seal of the said corporation, and that the said corporate seal, and their signatures as such officers, were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at the city of Baltimore, the day and year above written.

ARTHUR C. PIERCE,
Notary Public.

[SEAL.]

112 *Statement of the United States Fidelity and Guaranty Company, Rendered to the Department of Justice, Washington, D. C., at the Close of Business June 30, 1899.*

Commenced business August 1st, 1896.

Assets.

Investments, stocks and bonds (market value)	$1,178,917.08
Collateral loans	338,681.25
Real estate	65,346.66
Cash on hand and in banks	311,450.90
Loans secured by mortgage	37,275.10
Advances on real estate secured by deeds	21,249.83
Furniture and fixtures	100.00
Agents' balances less commissions	100,779.02
Mercantile and attorneys' subscriptions in course of collection	15,535.98
Interest due and accrued	16,257.84
	$2,085,593.66

Liabilities.

Capital stock paid in cash	$1,500,000.00
Cash on deposit held as security for risks	43,902.93
Surplus and reinsurance reserve	541,690.73
	$2,085,593.66

JOHN R. BLAND, *President.*

ARTHUR C. PIERCE,
Assistant Secretary.

113 STATE OF MARYLAND, } ss:
City of Baltimore, }

On this first day of July, A. D. 1899, before me, the undersigned, a notary public in and for the city and State aforesaid, appeared John R. Bland, president, and Arthur C. Pierce, assistant secretary, of the United States Fidelity and Guaranty Company, who being by me severally duly sworn, did depose and say that they are such officers of said company, and that the above and foregoing is a true and correct statement of the assets and liabilities of said company, as they appear upon the books of the said company.

Subscribed and sworn to before me this first day of July, A. D. 1899.

[SEAL.] FELIX R. SULLIVAN,
Notary Public.

(Endorsed:) Title of court and cause. Bond on writ of error. Within bond approved Sept. 7, 1899. Hiram Knowles, judge. Filed Sept. 7, 1899. Geo. W. Sproule, clerk.

And thereafter, to wit, on the seventh day of October, 1899, a writ of error was duly issued herein, being as follows, to wit:

114 *Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Montana, Greeting:

Because, in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Montana Mining Company, Limited, plaintiff in error, and St. Louis Mining & Milling Company of Montana, defendant in error, a manifest error hath happened, to the great damage of the said Montana Mining Company, Limited, plaintiff in error, as by its complaint appears,

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the ninth circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, thirty days from the date hereof, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

115 Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this the seventh day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL.]

GEO. W. SPROULE,
Clerk United States Circuit Court
for the District of Montana.

Allowed by:

HIRAM KNOWLES,
United States District Judge.

Service of the within writ of error and receipt of a copy thereof admitted this ninth day of October, A. D. 1899.

E. W. TOOLE AND
THOS. C. BACH,
Attorney for Defendant in Error.

Filed October 9, 1899.

GEO. W. SPROULE, *Clerk.*

Return to Writ of Error.

The answer of the judges of the circuit court of the United States for the district of Montana.

The record and all proceedings of the plaintiff in error, wherein mention is within made, with all things touching the same, I hereby certify, under the seal of said court, to the United States circuit court of appeals for the ninth circuit within mentioned, at the day
116 and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the court:

[SEAL.]

GEO. W. SPROULE, *Clerk.*

And thereafter, to wit, on the seventh day of October, 1899, a citation was duly issued herein being as follows, to wit:

Citation.

UNITED STATES OF AMERICA, *ss:*

To St. Louis Mining and Milling Company of Montana, Greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals for the ninth circuit, to be held at the city of San Francisco, State of California, thirty days from the date of this citation, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Montana, wherein The Montana Mining Company, Limited, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

117 Witness the Honorable Hiram Knowles, judge of the United States district court for the district of Montana, this seventh day of October, A. D. 1899.

HIRAM KNOWLES,
United States District Judge.

Service of the within citation admitted and copy received this ninth day of October, A. D. 1899.

E. W. TOOLE AND
T. C. BACH,
Attorneys for Defendant in Error.

Filed October 9, A. D. 1899.

GEO. W. SPROULE, *Clerk.*

And thereafter, to wit, on the twenty-first day of October, 1899, a stipulation as to maps was filed herein as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, Defendant.

Stipulation as to Maps.

118 It is hereby stipulated by and between the parties to the above-entitled action that the maps heretofore introduced in evidence upon the trial of the said action in the said court, and marked Plaintiff's Exhibit No. 1 and No. 1*a*, and Defendant's Exhibit No. 3, may be transmitted by the clerk of the said circuit court to the clerk of the circuit court of appeals for the ninth circuit, and by said clerk of said circuit court of appeals filed in the causes heretofore or about to be taken to the said circuit court of appeals on writs of error by the said plaintiff and defendant in the above-entitled action, and when so filed the said original maps may be used on the argument of the said writs of error with the same force and effect as if the said maps had been inserted in the record transmitted by the clerk in the said several writs of error.

Dated October 16, 1899.

CULLEN, DAY & CULLEN,
Attorneys for Plaintiff.
E. W. TOOLE AND
THOS. C. BACH,
Attorneys for Defendant.

(Endorsed:) No. 291. In the circuit court, United States district of Montana. St. Louis Mining & Milling Company *vs.* Montana Mining Company, Limited. Stipulation. Filed Oct. 21, 1899. Geo. W. Sproule, clerk.

119 *Clerk's Certificate to Transcript.*

UNITED STATES OF AMERICA, *District of Montana*, } ss:

I, George W. Sproule, clerk of the United States circuit court for the district of Montana, do hereby certify and return to the honorable, the United States circuit court of appeals for the ninth circuit, that the foregoing volume, consisting of one hundred and seventeen pages, numbered consecutively from one to one hundred and seventeen, is a true and correct transcript of the pleadings, process, records, orders, judgment and all proceedings had in said cause and of the whole thereof, as appear from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of forty-three dollars and ninety cents, and has been paid by the plaintiff in error.

In witness hereof, I have hereunto set my hand and affixed the seal of said United States circuit court at Helena, Montana, this twenty-seventh day of October, A. D. 1899.

[SEAL.] GEO. W. SPROULE, *Clerk.*

120 (Endorsed:) No. 567. In the United States circuit court of appeals for the ninth circuit. The Montana Mining Company, Limited, plaintiff in error, *vs.* The St. Louis Mining & Milling Company of Montana, defendant in error. In error to the circuit court of the United States for the district of Montana. Transcript of record. Filed Nov. 3, 1899. F. D. Monckton, clerk. By Meredith Sawyer, deputy clerk.

121 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error. } No. 567.

Filed May 14, 1900.

Arthur Brown and Thomas C. Bach, for the defendant in error; Chas. J. Hughes, and Cullen, Day & Cullen, for the plaintiff in error.

Before Gilbert, Ross, and Morrow, circuit judges.

GILBERT, circuit judge, delivered the opinion of the court:

The defendant in error, The St. Louis Mining and Milling Company, of Montana, was the plaintiff in an action brought against the plaintiff in error, The Montana Mining Company, Limited, for

trespass and conversion of ore which was alleged to have been taken from the plaintiff's mine by the defendant in the action. The plaintiff in the action owned the St. Louis mining claim and the defendant owned the Nine Hour mining claim which adjoined it on on the east. The principal contention in the case concerns the construction to be given to a conveyance which was executed by the
122 owners of the St. Louis claim to the owners of the Nine Hour claim. The conveyance was made to settle a controversy that had arisen concerning the easterly boundary line of the St. Louis claim. That was the older of the two claims. At the time of applying for a patent, the locators thereof included in their survey a portion of the premises which were claimed by the owners of the Nine Hour claim. The latter made an adverse claim, and brought an action thereupon. Before the cause came on for trial, the suit was compromised. It was agreed that as soon as patent was obtained to the St. Louis claim, the owners thereof would convey back to the owners of the Nine Hour claim the strip of land which was in controversy, a strip thirty feet wide, to be described by metes and bounds, "together with all mineral therein contained." The owners of the St. Louis claim, having obtained the patent, refused to make the conveyance. Suit was brought by the owners of the Nine Hour claim for specific performance of the contract. In the complaint in that suit, it was alleged that the contract had been made "for the purpose of settling and agreeing upon the boundary line between the said Nine Hour Lode mining claim and the said St. Louis mining claim." A decree was rendered in the suit in favor of the plaintiff therein, and in pursuance thereof, a conveyance was executed by The St. Louis Mining and Milling Company, the defendant in error here, conveying to the Montana Mining Company, Limited, the thirty-foot strip by metes and bounds, "together with all the mineral therein contained, together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz rock and earth therein, etc." It was shown upon the trial of the case at bar that in the St. Louis claim there are two veins, one
123 the discovery vein, running through the claim from end to end, northerly and southerly, and dipping to the east, and a second vein apexing for a long distance within the claim and dipping easterly underneath the Nine Hour claim, a portion thereof dipping underneath the premises which were conveyed by the deed above referred to. The question involved in the suit is the ownership of the ores of said second vein, which lie beneath the said conveyed premises, and of which the apex of the vein which carries the same lies entirely within the St. Louis claim.

It is contended by the plaintiff in error that by the deed above referred to, there was conveyed to it from the owners of the St. Louis claim, title to all the ores lying beneath the surface of the strip of land therein described, and lying eastward of a vertical plane extended downward on the division line so created between the two claims. We are unable to assent to this contention. In interpreting the conveyance in question, regard must be had not only to its terms, but to the subject-matter involved and the surrounding cir-

cumstances, in order to ascertain the intention of the parties. Said the court in Richmond Mining Co. *v.* Eureka Mining Co., 103 U. S. 846: "The language used is to be construed with reference to the peculiar property about which the parties were contracting." The court, in the light of the circumstances of that case, held that a line "continued downward to the center of the earth was not a vertical plane, but must be construed as extending the boundary line downwards through the dips of the veins or lodes, wherever they might go in their course towards the center of the earth." The controversy between the owners of the St. Louis and the Nine Hour claims was one which involved surface lines only. No dispute had arisen concerning the ores beneath the surface.

The owners of the Nine Hour claimed nothing more than
124 that the eastern side line of the St. Louis, as it was surveyed, encroached upon their territory. They based their adverse action upon that contention. The compromise was an admission that their claim was just. When the suit was brought for the specific performance of the compromise contract, it was brought by the successors in interest of those who had represented the Nine Hour claim at the time of the compromise. The plaintiffs therein were not the assignees of the contract. They maintained the suit solely as owners of the Nine Hour claim, and upon the theory that the strip of land so contracted to be conveyed, was a portion of the Nine Hour claim. All these antecedent circumstances leading up to and culminating in the deed, are properly considered in determining what was the intent of the parties to the contract. If the adverse action which was brought by the owners of the Nine Hour claim had gone to trial and had resulted in a judgment fully sustaining their contention, the result would have been to fix a surface line of division between the two claims, without affecting rights to the ores beneath the surface otherwise than as they are controlled by the mining laws of the United States. The owners of the St. Louis claim would still have retained the right to follow their vein extralaterally in its dip beneath the surface of the strip of land which was the subject of the conveyance. Upon what theory can it be said that the owners of the Nine Hour claim acquired more by the conveyance which was made to compromise the action than they could have acquired by a judgment in the action itself, fixing the boundary upon the very line which they contended was the true line? It is not to be supposed that the owners of the St.

Louis claim intended by the compromise contract not only
125 to surrender the whole of their contention concerning the true location of the boundary line, but also to divest their claim of its extralateral rights, rights that had not been in litigation and had not been assailed by the owners of the adjoining claim. To manifest such an intention, the terms of the contract and of the conveyance would under the circumstances need to be clear and explicit. The use of the words "together with all the minerals therein contained" is not sufficient. These words so inserted in the contract and in the deed are not more inclusive or more significant than the words universally employed in grants of mining

claims, "together with dips, spurs, angles, and also all the metals, ores, etc., therein." Counsel for the plaintiff in error rely upon two decisions which, it is said, favor the construction which they contend for, the Eureka case, 4 Sawyer, 302, and Stinchfield *v.* Gillis, 107 Cal., 86. In the first case, two owners of several adjoining claims, had fixed and agreed upon a line running northerly for a fixed distance which should be a division between the claims. It was not a line running with the strike of the vein, but across it. Thereafter a controversy arose concerning the right to mine the ores of the vein at a point beneath the surface further north than the line of division extended. The court held that the line so arbitrarily adopted must be projected as far as the lode extended, and must necessarily divide all that the location upon the surface carried. In that case the parties to the agreement had by the terms thereof made so clear their intention to divide their claims by a vertical plane and to confine their mining rights to either side thereof, that there was no room for construction. In the case of Stinchfield *v.* Gillis,
it was held that if the locator of a mining claim should convey
126 a portion of his claim by metes and bounds, without any reservation in his deed of conveyance, his grantee would be entitled to all the gold that might be found within the ground conveyed, in any vein whose apex was within the surface lines of his deed. Said the court, p. 90, "All that we hold is, that inasmuch as the gold in question was within the ground conveyed by Gillis to the plaintiff, and in a vein whose apex was within the surface lines of that ground, it belonged to the plaintiff." We do not see that either case affords light upon the proposition involved in the case at bar. Upon consideration of all the circumstances, we entertain no doubt that it was the purpose of the contracting parties to fix a boundary line between the two mining claims, reserving to each claim the rights that would have attached if the boundary line had been settled without controversy, and the language of the contract and of the deed sustains that conclusion.

It is earnestly contended that the complaint does not state a cause of action, for the reason that it appears therefrom that the vein which the defendant in error claims the right to pursue under the surface so conveyed to the plaintiff in error is not the discovery vein, and that there is no allegation that the discovery vein runs in any particular direction, or that its strike would intersect the end lines, or that it runs lengthwise of the claim rather than across, or that it dips in any given direction, and that for want of these allegations, the complaint wholly fails to show a right in the defendant in error to pursue beyond its vertical side lines the vein from which the ores in controversy were taken. It is true that the complaint does not mention the direction of the discovery vein or its dip. It contains the
allegation, however, that the defendant in error is the
127 owner of and in the possession of the St. Louis Quartz Lode mining claim, "and of the quartz, rock, and ore, and precious metals contained in any and all veins, lodes, and ledges of mineral-bearing rock through their entire depth, the tops or apices of which

lie within the surface lines of the said fractional portion of said St. Louis Lode mining claim." It described the mining claim by metes and bounds, and shows that it is about fifteen hundred feet in length by nearly six hundred feet in width. The description closes with these words: "Said lots Nos. 54, and 55 A, extending 1,500 feet in length along said St. Louis vein or lode." It alleges that the strip of land beneath the surface of which the ores in controversy were mined, lies east of the east side line of the claim. It alleges that the dip of one of the veins having a portion of its apex inside of the surface of the St. Louis claim, is to the east and dips under and beneath the thirty-foot strip of the Nine Hour claim, and proceeds to allege that from said vein so apexing within the St. Louis claim and extending beneath the Nine Hour claim, the ores in controversy have been taken by the plaintiff in error. No motion or demurrer was filed to the complaint, but the plaintiff in error answered upon the merits.

In Walrath *v.* Champion Min. Co., 19 C. C. A., 328, this court said: "The act of 1872, in granting all other veins that were within the surface lines of previous locations, did not create any new lines for such other veins, nor invest the court with any authority to make new end lines for such other veins. * * * When the end lines of a mining location are once fixed, they bound the extra-lateral rights to all the lodes that are thereafter found within the surface lines of the location." In Del Monte Mining
128 Company *v.* Last Chance Mining Company, 171 U. S., 89, it was said: "Our conclusions may be summed up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface. Second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike. Third, every vein 'the top or apex of which lies inside of such surface lines extended downward vertically,' becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor. Fourth, the only exception to the rule that the end lines of the location as the locator places them, establish the limits beyond which he may not go in the appropriation of a vein on its course or strike, is where it is developed that in fact the location has been placed not along but across the course of the vein. In such case, the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines." Upon the expressions of the Supreme Court just quoted, and upon the assumption that the locator of a mining claim has, unless the contrary be shown, complied with the law in locating his claim, the defendant in error contends that the presumption arises that the discovery vein in this instance runs lengthwise with the claim and not across the same. This contention it is unnecessary here to consider. We find in the complaint the distinct allegation that the defendant in error owns all the

precious metals contained in any vein or lode of mineral-
129 bearing rock through their entire depth whose apex is within the surface of the St. Louis Quartz Lode mining claim, and the further averment that the ores in controversy were mined from a vein which so apexes within the surface of the claim. These averments are sufficient to show that a cause of action existed, and are sufficient to sustain the judgment.

It is contended that the court erred in refusing to instruct the jury, at the request of the plaintiff in error, that the defendant in error was not in such possession of the vein as to maintain the action of trespass. It is urged that the possession of the apex of the vein in the surface of the St. Louis claim was not the actual possession of the vein, as it extended beneath the surface of the Nine Hour claim. We are able to discover no reason why the actual possession of the surface of a mining claim does not extend to all that belongs to the claim. Such a possession is not constructive but actual. Said the court in Iron Silver Mining Co. *v.* Cheesman, 116 U. S., 553: "It is obvious that the vein, lode, or ledge of which the locator may have 'the exclusive right of possession and enjoyment,' is one whose apex is found inside of his surface lines, extended vertically; and this right follows such vein, though in extending downward it may depart from a perpendicular and extend laterally outside of the vertical lines of such surface location." In Pardee *v.* Murray, 4 Mont., 234, it was held that possession of the surface is possession of all veins or lodes whose apices are within such surface lines. Said the court, p. 277: "The possession of the respondent was sufficient to maintain this action. * * * Possession of the surface of a mining claim location is possession of all
130 veins, lodes, and ledges, the tops or apices of which are inside the surface lines, although such veins, lodes, and ledges, as they go downward, may extend outside such surface lines." The case of Hugunin *v.* McCunniff, 2 Colo., 367, cited by the plaintiff in error, does not sustain his contention. In that case the defendants had conveyed a mine and delivered a shaft and level in the mine to the vendor of the plaintiffs, retaining a certain other shaft and level in the same lode not connected with the first. The defendants afterwards took ore from the level and shaft which they retained. In trespass for the ores so taken, it was held that the plaintiffs had not the actual or the constructive possession of the place from which the ore was taken, for the reason that throughout the length of the level retained by them, the defendants had actual possession extending to all depths and levels from the surface to the center of the earth.

Error is assigned to the refusal of the court to instruct the jury not to include in their verdict the value of certain ores which had been mines, but which had been stored by the defendant therein, under an injunction issued in the action enjoining it from "disposing of, treating, and reducing any ores heretofore removed or extracted from said premises," for the reason that such ores were held subject to the order of the court and had not been converted to the use of the defendant. There is nothing in the pleadings or in the bill

of exceptions to show that such ores had been returned or tendered to the defendant in error or in any way accounted for, nor was evidence offered for the purpose of definitely fixing the value of such ore so that the court could have properly instructed the jury to take the same into account. It was for the plaintiff in error, if it desired, to have
131 the value of such ores deducted from the amount of the verdict, to have caused the record to show that the ores were offered to or were left in the possession of the defendant in error, and to have submitted evidence of their value. But there is another answer to this contention of the plaintiff in error. Although the instruction which was so requested was refused by the court, it does not appear from the bill of exceptions that the court did not in its charge to the jury fully and properly instruct upon that branch of the case. The bill of exceptions does not purport to contain all of the charge of the court. It recites but two instructions, and says that the court, "among other things," so instructed the jury.

Considering the whole record and all the assignments of error, we find no ground for which the judgment should be reversed, and it is accordingly affirmed.

(Endorsed:) Opinion. Filed May 14, 1899. F. D. Monckton, clerk.

132 United States Circuit Court of Appeals for the Ninth Circuit.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error. } No. 567.

In error to the circuit court of the United States for the district of Montana.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Montana, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed, with costs.

(Endorsed:) Judgment. Filed and entered May 14, 1900. F. D. Monckton, clerk.

133 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Defendant in Error.
No. 567.

To the honorable the judges of the United States circuit court of appeals for the ninth judicial circuit:

Now comes the plaintiff in error above named, The Montana Mining Company, Limited, and complains that in the records and proceedings had in the said cause and in the opinion and judgment rendered therein on the 14th day of May, A. D., 1900, manifest error hath happened to the great damage of your petitioner in this, to wit:

(*a.*) That in and by the opinion and judgment aforesaid it was held that the complaint in said cause did state facts sufficient to constitute a cause of action and did not state facts showing that the plaintiff had no cause of action.

(*b.*) Error was likewise committed by said court in its opinion and judgment aforesaid, in holding that the circuit court of the United States for the ninth circuit, district of Montana, did not commit error in permitting testimony to be given as to the existence of a discovery vein in the St. Louis Lode mining claim and
134 as to the strike and dip of the said vein, no allegation whatever with reference to such vein being made in the complaint, or being within the issues on the trial of said action.

(*c.*) The honorable, the circuit court of appeals likewise erred in holding that a vein which enters and departs through the same side line of a mining claim has or can have extralateral rights under the laws of the United States.

(*d.*) Error was likewise committed in said opinion and judgment in holding that the circuit court of the United States for the ninth circuit, district of Montana, did not err in permitting the witness John R. Parks to testify as to the use by your petitioner of the four-hundred-foot level in the Nine Hour Lode mining claim, there being no allegation in the complaint alleging any damages for the use and occupancy of the St. Louis Lode mining claim or any part or portion thereof.

(*e.*) It was likewise error in the opinion and judgment aforesaid to hold that the circuit court for the ninth circuit, district of Montana, did not err in receiving in evidence the judgment-roll in the specific-performance case shown in the record herein, and it erred in holding that the said judgment-roll was relevant and competent testimony.

(*f.*) It was likewise manifest error for this honorable court to hold in and by said opinion and judgment aforesaid that the circuit court for the ninth circuit, district of Montana, did not err in allowing testimony to be given by the plaintiff in said suit, to wit: the de-

fendant in error here, to recover for quartz rock and ore held by the said court under injunction, as shown at page 49 in the printed record accompanying this petition.

(*g*.) It was likewise error in this honorable court in and by its opinion and judgment aforesaid to hold that the above-
135 named defendant in error, The St. Louis Mining & Milling Company of Montana, was not estopped by its contract, the judgment rendered in the supreme court of the State of Montana in the specific-performance case aforesaid, and by its deed made in pursuance of said contract and judgment, from claiming any mineral whatever contained in the said thirty-foot strip or compromise ground.

(*h*.) Error was likewise committed in the opinion and judgment aforesaid in holding that the honorable, the circuit court of the ninth circuit, district of Montana, did not err in giving to the jury on the trial of said cause its instruction numbered 1, as shown in the record herein.

(*i*.) Error also happened in the opinion and judgment aforesaid in that this honorable court refused to give full faith and credit to the judgment of the supreme court of the State of Montana in the specific-performance case, the same being shown in the record herein at page 63 to page 86 thereof, in that it refused to hold that the above-named plaintiff, defendant in error here, was not estopped and enjoined in and by such judgment from claiming any mineral found in the said thirty-foot strip or compromise ground.

Your petitioner further shows that in this case the jurisdiction of the circuit court of the ninth circuit, district of Montana, was not dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States; but that in and by the complaint and pleading on the part of the defendant in error, plaintiff in the court below, there were question- arising under the Constitution and laws of the United States in this, to wit: Whether the owner of a mining claim under the laws of the United States might follow a vein beyond the
136 side lines of his claim, the apex of which said vein entered and departed through the same side line of his claim; also the further question as to whether he might pursue said vein beyond his own side line when the same departed therefrom at an acute angle beyond a point where the whole of the apex of such vein was within the lines of his own claim; and the further question as to what faith or credit should be given to the judgment in the specific-performance case hereinbefore mentioned; that as said case was originally brought in the said circuit court of the ninth circuit, district of Montana, the jurisdiction of said court depended entirely upon the said Federal questions and not upon the diversity of citizenship of the parties.

Wherefore your petitioner prays for an order allowing it to prosecute a writ of error from the honorable the Supreme Court of the United States to this court, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which your petitioner

shall give and furnish upon said writ of error, and that upon the giving of such security that all further proceedings in this court be suspended and stayed until the final determination of the said writ of error by the honorable the Supreme Court of the United States.

And your petitioner, as in duty bound, will ever pray.

C. J. HUGHES, JR.,
W. E. CULLEN, AND
E. C. DAY,
Attorneys for Petitioner.

137 Let the writ of error prayed for in the foregoing petition issue, and further proceedings in this cause in this court be stayed upon the petitioner executing a good and sufficient bond in the sum of twenty-five thousand dollars, conditioned as required by statute.

WM. B. GILBERT,
Circuit Judge.

(Endorsed:) Petition for writ of error, order allowing same, &c. Filed October 24, 1900, F D. Monckton, clerk, U. S. circuit court of appeals for the ninth circuit.

138 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MONTANA MINING COMPANY (LIMITED), Plaintiff in Error,
vs.
THE ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Defendant in Error.

Comes now the above-named plaintiff in error, by Messrs. Cullen, Day & Cullen and Charles J. Hughes, Jr., its attorneys, and assigns the following as errors upon which it will rely for the reversal of the opinion and judgment rendered by this court in this cause on the 14th day of May, A. D. 1900.

I.

The holding of this honorable court in its opinion and judgment aforesaid that the circuit court of the ninth circuit in and for the district of Montana, did not err in overruling the defendant's (the above-named plaintiff in error) objection to the introduction of any testimony on part of plaintiff (defendant in error) for the reason that the second amended supplemental complaint, which had been theretofore read to the jury, did not state facts sufficient to constitute a cause of action, and did state facts showing that the plaintiff had no cause of action.

II.

The holding of this court that the said circuit court did not err in permitting the witness William Mayger to testify that the discovery vein of the St. Louis Lode mining claim ran more parallel

with the location of the St. Louis Lode claim than in any
139 other direction, the said testimony being irrelevant and immaterial under the issues made by the pleadings.

III.

The holding of this court that the said circuit court did not err in admitting any and all of the testimony offered and by it received in evidence with reference to the discovery vein of said St. Louis Lode mining claim, and its strike and dip, the same being irrelevant, immaterial, and not competent testimony under the pleadings.

IV.

The holding of this court that the said circuit court did not err in permitting the witness James S. Keerl to testify that the lines representing the planes drawn upon Plaintiff's Exhibit No. 1, were drawn parallel to the end lines of the St. Louis Lode mining claim, such testimony being incompetent and immaterial, it not having been shown by any competent proof which were end lines or which were side lines of said claim.

V.

The holding of this court that the said circuit court did not err in permitting the witness James S. Keerl to give the dimensions of blocks numbered eight, nine, ten, and eleven, which were situated north of the 108-foot plane, as shown upon Plaintiff's Exhibit 1, and north of the plane intersecting the easterly boundary line of the St. Louis claim, at the point where the westerly boundary line of the thirty-foot strip intersects it, the same being incompetent, irrelevant and immaterial under the pleadings, it being alleged in the complaint that the defendant was the owner of the ground known as the compromise ground, together with all the mineral therein contained, and it being alleged in the answer that the said compromise ground had been conveyed by the plaintiff to the defendant, in pursuance of a bond for a deed, describing the compromise ground by
140 metes and bounds, and conveying the same to the defendant, together with all the mineral therein contained, which said bond and deed being attached as exhibits to the answer were not denied, but specifically admitted by the replication, and therefore the plaintiff was estopped from claiming any mineral within the said compromise ground, it clearly appearing from the testimony of said witnesses that the mineral about which he was testifying was within the lines of the compromise ground.

VI.

This court erred in holding that the said circuit court did not commit error in permitting the witness John R. Parks to testify that the discovery vein of the St. Louis lode ran generally parallel to the side lines of the said claim, there being no issue made by the pleadings relative to the discovery vein of the said claim, or as to its strike or dip.

VII.

This court erred in holding that the said circuit court did not err in permitting the witness John R. Parks to testify to the contents of blocks eight, nine, and ten, it clearly appearing from the testimony that the said blocks were in what was designated and known as the compromise ground, and that under the allegations in the pleadings the plaintiff was estopped to claim any mineral found therein.

VIII.

This court erred in holding that the said circuit court did not err in permitting the witness John F. Parks to testify that the 400-foot level had been used by the defendant in the operation of its mine, such testimony being irrelevant and immaterial, in that this is an action for the recovery of damages for the alleged extraction and conversion of ores claimed by the plaintiff, and is not an action to recover for the use of levels constructed by the defendant upon its own property.

141 IX.

This court erred in holding that the said circuit court did not err in permitting the witness Walter Proctor Jenney to testify that the discovery vein of the St. Louis Lode claim was connected with a vein called the discovery vein and in permitting the said witness to describe the said vein, such testimony being immaterial and irrelevant, there being no allegations in the complaint with reference to the discovery vein of the St. Louis Lode claim and no issue in the pleadings with reference thereto.

X.

This court erred in holding that the said circuit court did not err in admitting in evidence in rebuttal the complaint and exhibits attached thereto, the answer, findings and judgment of the court in the case in the district court of the first judicial district of the State of Montana, wherein The Montana Mining Company, Limited, was plaintiff, and the defendant in error herein was defendant, the same not being in rebuttal of anything proved or offered to be proved on the part of the defendant, and for the further reason that the evidence was not material, there being no ambiguity in either the bond or deed attached as exhibits to defendant's answer herein.

XI.

This court erred in holding that the said circuit court did not err in refusing to give to the jury the following instruction requested by the plaintiff in error:

"The parties to this action having by agreement settled the boundary line between their two claims by establishing the western side line of the compromise ground as such boundary line, and the plaintiff having conveyed by deed the said compromise ground to the

defendant, you are instructed that you cannot find a verdict
142 for the plaintiff for any ores except such as you find were taken out north of a line drawn down from the point of intersection of the westerly boundary line of the compromise ground with the easterly boundary line of the St. Louis lode, parallel with the end lines of the said St. Louis lode, and lying between said lines, and the northerly projected end line, as claimed in the complaint."

XII.

This court erred in holding that the said circuit court did not err in refusing to give to the jury the following instruction:

"The plaintiff having heretofore conveyed to the defendant the strip of ground known as the thirty-foot strip, or compromise ground, describing the same by metes and bounds, and by such deed having conveyed the same, together with all the mineral therein contained, and it not appearing that such deed was obtained by any fraud practiced by the defendant upon the plaintiff, you are instructed that in and by such deed the plaintiff is now estopped from claiming any mineral whatever, which was or is contained in said compromise ground, and this without regard to where the lead, in which said mineral has been, is, or may be found, has its apex. The court instructs you that the plaintiff in the action can only recover for such mineral-bearing quartz rock and ore as you shall find the defendant has mined, taken and converted to its own use, lying east of the east line of the compromise ground and between the lines mentioned in the complaint, whereat the plaintiff asks to have lines drawn down parallel to the end lines of its St. Louis claim."

XIII.

This court erred in holding that the said circuit court did not err in refusing to give to the jury the following instruction:

143 "If you believe from the testimony in this case that the defendant, though it mined the ores *in* which the plaintiff has designated as blocks 8 and 11, has not converted the same, but yet has such ore ready to deliver to said plaintiff, should this court finally decide the plaintiff to be the owner thereof, you cannot include the same or the value thereof in any verdict you may render for the plaintiff. Such ores as are thus held under and subject to the order of this court have not been converted by the defendant."

XIV.

This court erred in holding that the said circuit court did not err in refusing to give to the jury the following instruction requested by the plaintiff in error:

"You are instructed that this is an action for damages occasioned by trespass and the taking and carrying away of ore. To maintain this action the plaintiff must have been in the possession of the premises and the place of trespass at the time of the commencement of this action and at the time of trial, and the burden of proof was upon the plaintiff to show such possession. The plaintiff has failed

to introduce any evidence of such possession, except such as arises by operation of law from the possession of the apex of the vein from which the ore is alleged to have been extracted. This is termed constructive possession. On the other hand the evidence is clear and uncontradicted that the defendant had, and still has, actual possession of the surface ground from underneath which the ore was extracted, if any has been shown to have been extracted by the defendant company, and possession of the place of trespass. Under this state of circumstances the plaintiff is not entitled to recover in this form of action, and your verdict will be for the defendant."

144 XV.

This court erred in holding that the said circuit court did not err in refusing to give to the jury the following instruction requested by the plaintiff in error:

"You are instructed that in this case the burden of proof is upon the plaintiff to make out by a preponderance of the testimony every fact material to its cause of action. It must not only show that ore has been taken by the defendant, of which it is the owner, but before it can be entitled to recover it must show the market value of the ore so taken, and in determining the value of the ore so taken you are instructed that the plaintiff is entitled to the value of the ore as it stood in the mine; and in estimating this value you will take into consideration whether or not the ore as it stood in the mine was of sufficient value to pay the cost of extraction and milling and reducing it to bullion in the ordinary method of reducing such ores in the vicinity where the ore was taken; and if from the evidence you find that the ore so taken by the defendant, if you find any was taken, was not of sufficient value to pay the cost of such extraction and reduction, then the plaintiff is not entitled to recover for such ore."

XVI.

This court erred in holding that the said circuit court did not err in giving the following instruction to the jury:

"Instruction No. 1. The evidence in this case shows that the discovery vein of the St. Louis claim extends substantially from one end line to the other lengthwise of the claim; that it dips to the east and that there is another vein having a section of its apex wholly within the St. Louis claim, between the planes known as the 502 and the 108."

XVII.

145 This court erred in holding that the said circuit court did not err in giving the following instruction to the jury:

"Instruction No. 2. In estimating damages, if the jury find that the defendant has prevented the plaintiff from ascertaining the true value of the ore, either by mixing the ore taken from the plaintiff's ground with ore belonging to the defendant, or with any other material taken from any other place, then the jury are at liberty to consider the highest value of ore found in the vicinity of that ore."

Wherefore the said, The Montana Mining Company, Limited, plaintiff in error, prays that the judgment of said circuit court of appeals of the ninth judicial circuit be reversed and that the said circuit court of appeals be directed to enter an order requiring the circuit court of the ninth circuit within and for the district of Montana to set aside the verdict rendered herein, and also dismissing the said action.

C. J. HUGHES, JR.,
W. E. CULLEN, AND
E. C. DAY,
Attorneys for Plaintiff in Error.

Endorsed: Assignment of errors. Filed October 24, 1900. F. D. Monckton, clerk U. S. circuit court of appeals, for the ninth circuit.

146 Know all men by these presents, that we, The Montana Mining Company, Limited, as principal, and The United States Fidelity and Guaranty Company, a corporation of Baltimore, Md., as surety, are held and firmly bound unto The St. Louis Mining and Milling Company of Montana in the full and just sum of twenty-five thousand dollars, to be paid to the said The St. Louis Mining & Milling Company of Montana, its certain attorney executors, administrators or assigns; to which payment, well and truly to be made, we bind ouselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of October, in the year of our Lord one thousand nine hundred.

Whereas, lately at a term of the circuit court of appeals of the United States for the ninth circuit, in a suit depending in said court, between The Montana Mining Company, Limited, plaintiff in error, and The St. Louis Mining & Milling Company of Montana, defendant in error, a judgment was rendered against the said The Montana Mining Company, Limited, affirming a judgment for the sum of $23,209, rendered against it on the 16th day of Aug., 1899, in the U. S. circuit court, dist. of Montana, and in favor of the above-named The St. Louis M. & M. Co. of Montana, and the said The Montana Mining Company, Limited, having obtained from said court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said The St. Louis Mining & Milling Company of Montana citing and admonishing it to be and appear at a United States Supreme Court, to be holden at the city of Washington, in the District of Columbia, on the 20th day of December next:

147 Now, the condition of the above obligation is such, that if the said The Montana Mining Company, Limited, shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE MONTANA MINING CO., L'D, [SEAL.]
By ALEX. BURRELL, *Attorney-in-fact.* [SEAL.]
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By its attorney-in-fact,
JOHN H. ROBERTSON. [SEAL.]

Acknowledged before me the day and year first above written, by Alex. Burrell.

[SEAL.] J. S. MANLEY,
U. S. Commissioner, Northern District of California.

(Cancelled internal-revenue stamps.)

(Endorsed:) Bond on writ of error. Form of bond and sufficiency of securities approved. Wm. B. Gilbert, circuit judge. Filed Oct'r 24, 1900, F. D. Monckton, clerk.

148 United States Circuit Court of Appeals for the Ninth Circuit.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF Montana.
} No. 567.

Certificate of Clerk C. C. A. to Transcript.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and forty-seven (147) pages, numbered from one (1) to one hundred and forty-seven (147), inclusive, to be a true copy of the record, and of the assignment of errors, and all proceedings in the above-entitled case, as the same appear of record in my office, and that the same, together, constitute the return to the annexed writ of error.

Attest my hand and the seal of said circuit court of appeals, at San Francisco, California, this 15th day of November, A. D. 1900.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

{ Ten-cent United States internal-revenue stamp, canceled 11, 15, 1900. F. D. M., cl'k. }

149 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable, the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you, or some of you, between The Montana Mining Company, Limited, plaintiff in error *vs.* The St. Louis Mining and Milling Company of Montana defendant in error, a manifest error hath happened, to the great damage of the said The Montana Mining Company, Limited, plaintiff in error, as by its complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all

things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the 20th day of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of October, in the year of our Lord one thousand, nine hundred.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Allowed by
WM. B. GILBERT,
Circuit Judge.

150 [Endorsed:] Docketed. No. 567. United States circuit court of appeals for the ninth circuit. Montana Mining Co. (L'd), plaintiff in error, vs. St. Louis Mining and Milling Co. of Montana, defendant in error. Original writ of error. Filed November 2d, 1900. F. D. Monckton, clerk U. S. circuit court of appeals, for the ninth circuit.

Due personal service of the within writ of error is hereby admitted & receipt of copy acknowledged this 29th day of October, A. D. 1900. Dated at Helena, Mont., on said day.

THOMAS C. BACH,
EDWIN W. TOOLE,
Attorneys for St. Louis Mining & Milling Co. of Mont., Def't in Error

Return to Writ of Error.

The answer of the judges of the United States circuit court of appeals for the ninth circuit.

As within we are commanded, in a certain schedule to this writ annexed we certify under the seal of our said circuit court of appeals the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within-named defendant in error.

By the court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

151 UNITED STATES OF AMERICA, *ss:*

The President of the United States to The St. Louis Mining and Milling Company of Montana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, in the District of Columbia, on the 20th day of December, 1900, pursuant to a writ of error duly issued out of the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Montana Mining Company, Limited, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Gilbert, U. S. circuit judge & judge of the United States circuit court of appeals for the ninth circuit, this 24th day of October, A. D. 1900.

WM. B. GILBERT,
Circuit Judge.

[Endorsed:] Docketed. No. 567. U. S. circuit court of appeals for the ninth circuit. The Montana Mining Co., Limited, pl'ff in error, *vs.* The St. Louis Mining and Milling Co. of Montana. Original citation. Filed November 2nd, 1900. F. D. Monckton, clerk U. S. circuit court of appeals, for the ninth circuit.

Due personal service of the within citation is hereby admitted and receipt of copy acknowledged this 29th day of October, A. D. 1900.

Dated at Helena, Montana, on said day.

THOMAS C. BACH,
EDWIN W. TOOLE,
Attorneys for St. Louis Mining & Milling Co. of Montana, Def't in Error.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 214.

THE MONTANA MINING COMPANY, LIMITED, PLAINTIFF IN ERROR,

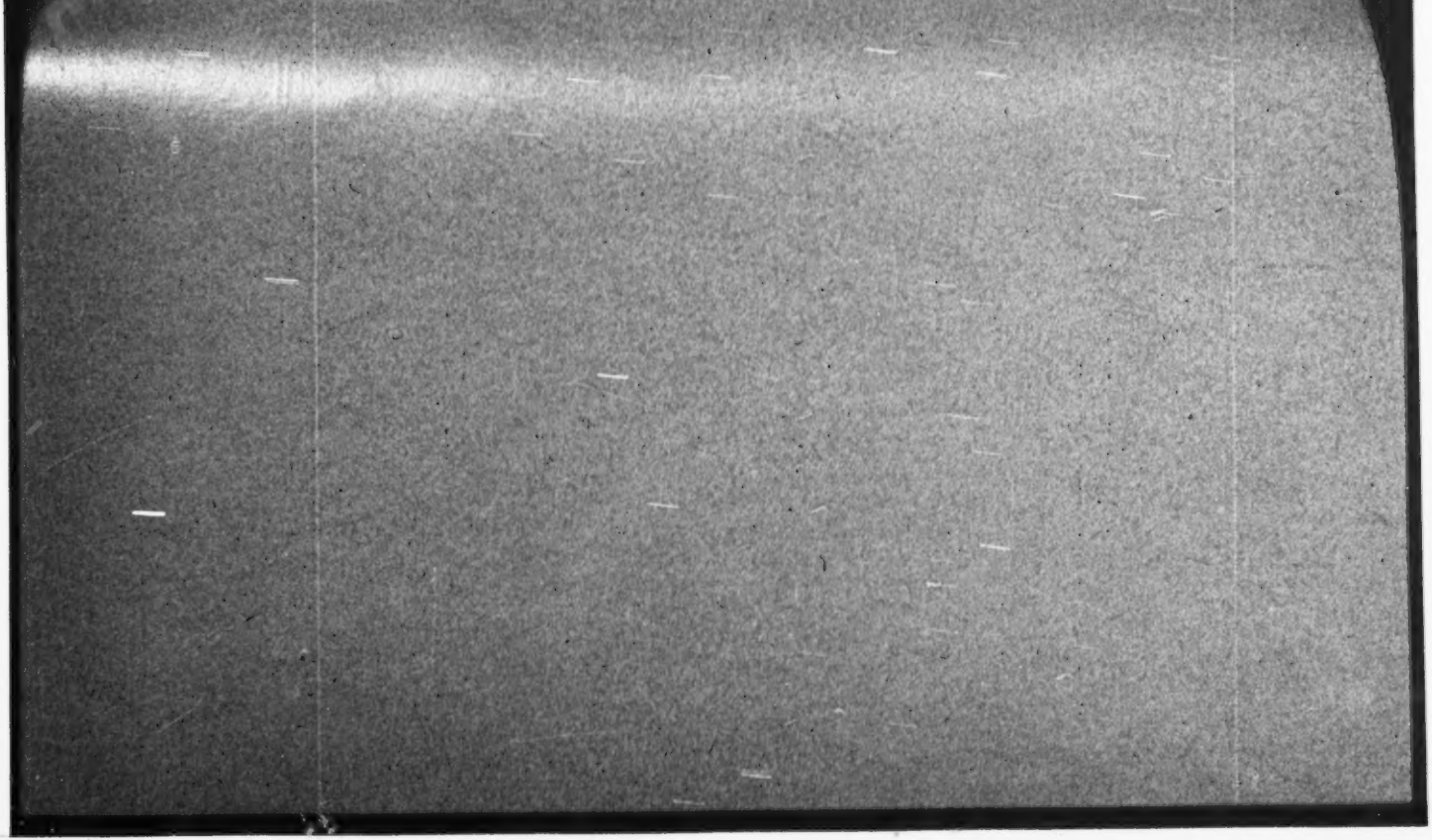
vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED DECEMBER 18, 1900.

(18,002)



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1 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Caption.

Be it remembered, that on the twenty-sixth day of June, 1899, the plaintiff herein filed its second amended and supplemental complaint, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, Defendant.

Second Amended and Supplemental Complaint.

Now comes the plaintiff in the above-entitled action, and for a second amended and supplemental complaint, by leave of the court first had and obtained, complains of the defendant herein, and for cause of action alleges:

2 I.

That at the several dates hereinafter mentioned this plaintiff was, and now is, a corporation duly organized and existing under the laws of the then Territory (now State) of Montana, under the corporate name of St. Louis Mining & Milling Company of Montana, and as such was and is entitled to own, enjoy, and possess mining property in the said State, with all the rights, privileges, and immunities incident and appurtenant thereto; and that at said dates the said defendant, Montana Mining Company, Limited, was and now is a foreign corporation, incorporated under the laws of Great Britain, and, as such corporation, by virtue of its compliance with the laws of the then Territory (now State) of Montana, was and is entitled and authorized to do and transact business in said State.

II.

That at the times hereinafter mentioned this plaintiff, as such corporation, was, and now is, the owner of, entitled to, and in the actual possession and occupation of that certain quartz lode mining claim known as the St. Louis Quartz Lode mining claim, and of the quartz, rock and ore and precious metals contained in any and all veins, lodes and ledges of mineral-bearing rock through their entire depth, the tops or apexes of which lie within the surface lines of the said

fractional portion of said St. Louis Lode mining claim, although such veins, lodes or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side
line of the surface of the said St. Louis Quartz Lode mining
3 claim, which is situated in Ottawa mining district, in the county of Lewis and Clarke, and State of Montana, and more particularly described as follows, to wit:

Beginning, for the description of lots Nos. 54 and 55 A at corner No. 1, a granite stone 16 by 12 by 12 inches, marked "1 M. C. 54," a mound of stones alongside, from which the quarter-section corner on south boundary of section 36, in township 12 north of range 6 west of the principal meridian bears south 74 degrees and 15 minutes east 353 feet distant.

Thence, first course, magnetic variation 19 degrees east, south 21 degrees and 15 minutes west, 102 feet, intersect line between townships 11 and 12 north of range 6 west, a granite stone 15 by 14 by 12 inches, marked "54 M. C. 55 A," 450 feet to a point from which a shaft bears north 67 degrees, west 285 feet distant, and from said shaft an open cut, 3 by 5 feet, 100 feet long, runs south 54 degrees east; 655 feet to a point from which a shaft bears west 153 feet distant, 1,097 feet to corner No. 2, a slate stone 20 x 12 x 5 inches, marked "2 M. C. 55 A," a mound of stones alongside, from which the center of discovery shaft bears north 35 degrees 30 minutes west 289 feet distant.

Thence, second course, magnetic variation 19 degrees east, south 51 degrees 30 minutes west, 403 feet to corner No. 3, a slate stone 14 by 10 by 4 inches, marked "3 M. C. 55 A," a mound of stones alongside, from which the southeast location corner bears south 10 degrees east 435 feet distant.

Thence, third course, magnetic variation 19 degrees east,
4 north 45 degrees 30 minutes west, 600 feet to corner No. 4, a granite stone 20 by 9 by 7 inches, marked "4 M. C. 55 A," a mound of stones alongside, from which the southwest location corner bears south 79 degrees west 182 feet distant.

Thence, fourth course, magnetic variation 18 degrees east, north 51 degrees 15 minutes east 425 feet to corner No. 5, a granite stone 16 by 12 by 6 inches, marked "5 M. C. 55 A," a mound of stones alongside.

Thence, fifth course, magnetic variation 19 degrees east, north 21 degrees 45 minutes east, 529.7 feet distant, intersects said township line, a granite stone 18 by 16 by 7 inches, marked "54 A, 54 M. C.," 1,069 feet to corner No. 6, a granite stone 18 by 12 by 6 inches, marked "6 M. C. 54 A," from which a fir tree 13 inches in diameter, marked "6 M. C. 54 B. T.," bears north 15 degrees east 24 feet distant, and a pine tree 5 inches in diameter, marked "C. M. C. 54 B. T.," bears south 54 degrees east, 21.5 feet distant.

Thence, sixth course, magnetic variation 19 degrees east, south 45 degrees 30 minutes east 515.5 feet to corner No. 1 of lot No. 40, the Drumlummon Lode claim, 579 feet to corner No. 1, the place of beginning, said lots Nos. 54 and 55 A extending 1,500 feet in length

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13 And thereafter, to wit, on the thirtieth day of June, 1899, the answer of defendant was filed herein, being as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY, Plaintiff,
vs.
MONTANA MINING COMPANY (LIMITED), Defendant.

Answer to Second Amended and Supplemental Complaint.

Comes now the defendant above named, and for its answer to the second amended and supplemental complaint of plaintiff on file herein, says:

I.

It admits the allegations contained in paragraphs numbered 1, 2, and 3 of the said second amended and supplemental complaint.

II.

It denies each and every other allegation in the said second amended and supplemental complaint contained.

III.

And this defendant, further answering, says that the plaintiff is estopped from claiming any of the mineral found or which may
14 hereafter be found in said thirty-foot strip or compromise ground, for that heretofore, to wit, on or about the seventh day of March, A. D. 1884, one Charles Mayger, who was then and there the predecessor in interest of plaintiff, made, executed and delivered to William Robinson, James Huggins and Frank P. Sterling, who were and are the predecessors in interest of this defendant, a bond for a deed, wherein and whereby he covenanted and agreed to convey the said thirty-foot strip or compromise ground to the predecessors in interest of this defendant, or their assigns, with all the mineral therein contained, a copy of which said bond is hereto attached, marked Exhibit "A," and made a part of this answer. That thereafter and after the said Charles Mayger had obtained a United States patent for the whole of said St. Louis Lode mining claim, including said thirty-foot strip or compromise ground, the said Mayger, in order to cheat and defraud this defendant, assumed to convey the said compromise ground to the above-named plaintiff. That thereafter this defendant demanded of and from the said defendant and from the said Mayger a deed for the said compromise ground in accordance with the terms and provisions of the bond aforesaid, and the said defendant and the said Mayger having refused and declining to make, execute or deliver such a deed, this defendant thereafter, and on or about the sixth day of September, A. D. 1894, commenced an action in the district court of the first judicial district of the State of Montana, within and for the county of Lewis & Clarke, wherein this defendant

north 12 degrees 15 minutes east, distant 520 feet, where said hanging wall is disclosed at the surface by an upraise of said projected parallel end line, 5 feet west of the east side line of said St. Louis Quartz Lode mining claim; thence, from where the said projected parallel end line passes through said east side line of said claim, and along the east side line of the said claim between corners Nos. 1 and 2, south 21 degrees 15 minutes west, 512.7 feet to a point, being the intersection of the said east side line of said St. Louis Quartz
7 Lode mining claim, between corners Nos. 1 and 2, with the west line of the said thirty-foot strip hereinbefore described; thence south 59 degrees 50 minutes west 106 feet and along the west line of the said thirty-foot strip, to a projected parallel end line of said St. Louis Quartz Lode mining claim, extended vertically downward, which passes through the hanging wall of said vein at the surface and at the crossing of the said hanging wall with the west line of the said thirty-foot strip.

That it is also the owner of, in possession and entitled to the possession of an additional portion of the said apex of said claim lying to the south of the southern point hereinbefore mentioned, a distance of twenty-five feet, whereat the foot wall of the said vein passes out of the east side line of the said St. Louis Lode mining claim.

A map or plat showing the point at which the said vein enters said St. Louis Lode mining claim as so hereinbefore described, and whereat the same departs therefrom upon the east line of said claim is hereto attached, marked Exhibit "A," and made a part of this complaint, and to which reference is made.

V.

That notwithstanding the right of the said plaintiff in the premises, said defendant, on or about the thirtieth day of June, 1893, knowingly, wrongfully, and unlawfully, by means of drifts, shafts, tunnels and underground workings, entered into and upon that portion of the vein, lode or lead so apexing within the said St. Louis mining claim, and commenced extracting quartz, rock and ore therefrom, and removing the same, and converting it to its own use and benefit, and are now still removing and converting the same, which said quartz, rock and ore is of the value of two hundred
8 thousand dollars; on account thereof this plaintiff has been damaged in said sum.

That since the filing of the original complaint herein, and up to the twenty-sixth day of June, 1899, said defendant, Montana Mining Company, Limited, has extracted a large quantity of quartz, rock and ore from the premises and veins above described and within the planes aforesaid, and converted the same and the minerals therein contained to their own use, of the value of fifty thousand dollars, and to the damage of this plaintiff in said sum.

Wherefore, plaintiff prays judgment for the said sum of two hundred and fifty thousand dollars, together with its costs and disbursements in this behalf expended.

TOOLE, BACH & TOOLE,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
State of Montana, County of Lewis and Clarke, } ss:

On this twenty-fourth day of June, A. D. 1899, personally appeared before me, Harry Harris, a notary public in and for the said county and State, William Mayger, general manager and superintendent of The St. Louis Mining and Milling Company of Montana, the plaintiff corporation above named, who being by me duly sworn, deposes and says: That he is the general manager and superintendent of
9 said company and familiar with its business; that he has read the foregoing bill of complaint, and knows the contents thereof: and that the same is true to the best of his knowledge, information and belief.

WILLIAM MAYGER.

Subscribed and sworn to before me this twenty-fourth day of June, A. D. 1899.

HARRY HARRIS,
Notary Public in and for Lewis & Clarke County,
State of Montana.

(Endorsed:) No. 291. (Title of court and cause.) Second amended and supplemental complaint. Filed and entered June 26, 1899. Geo. W. Sproule, clerk.

10 The summons in this cause as heretofore issued being in the words and figures as follows, to wit:

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY (LIMITED), RAWLINSON T. BAYLISS, Alexander Burrell, Nicholas Francis, Isaac Warren, Joseph Harvey, John Jewell, and Thomas Howkins, Defendants.

Action brought in the said circuit court and the complaint filed in the office of the clerk of said circuit court in the city of Helena, county of Lewis and Clarke.

Summons.

The President of the United States of America to Montana Milling Company (Limited), Rawlinson T. Bayliss, Alexander Burrell, Isaac Warren, Joseph Harvey, Nicholas Francis, John Jewell, and Thomas Howkins, Greeting:

11 You are hereby required to appear in an action brought against you by the above-named plaintiff, in the circuit court of the United States, ninth circuit, in and for the district of Mon-

tana, and to file your plea, answer or demurrer to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the clerk of said court, in the city of Helena, and county of Lewis & Clarke, within twenty days after the service on you of this summons, or judgment by default will be taken against you.

The said action is brought to recover a judgment against you, said defendants, for the sum of two hundred thousand — damages, sustained by plaintiff from you, said defendants, for wrongfully, unlawfully and willfully, on or about the thirtieth day of June, 1893, entering upon one of the veins, lodes or ledges bearing gold, silver, lead and other precious metals, and having its top or apex within the surface location of the St. Louis Quartz Lode mining claim, the property of said plaintiff; and within the vertical planes thereof, and extracting therefrom and taking large quantities of ore and quartz rock bearing gold, silver, lead and other precious metals lying within the premises of said plaintiff, and which you have converted to your own use and benefit (for a more particular description of said premises you are hereby referred to the complaint), all of which will more fully appear by reference to the complaint on file herein, a copy of which is herewith served, and for costs of suit. And if you fail to appear and plead, answer or demur, as herein required, your default will be entered, and the plain-
12 tiff will apply to the court for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this eighteenth day of September, one thousand eight hundred and ninety-three, and of our Independence the one hundred and eighteenth.

[SEAL.] GEO. W. SPROULE, *Clerk.*

UNITED STATES MARSHAL'S OFFICE, }
District of Montana. }

I hereby certify that I received the within writ on the nineteenth day of September, 1893, and personally served the same on the twentieth day of September, 1893, on the Montana — Company, Limited, a corporation, by delivering to and leaving with Rawlinson T. Bayliss, agent and general manager of the said corporation, on Rawlinson T. Bayliss personally, and Alexander Burrell, Isaac Warren, Jos. Harvey, Nicholas Francis, John Jewell and Thomas Howkins, said defendants named therein, personally, at Marysville, county of Lewis & Clarke, in said district, a certified copy thereof, together with a copy of the complaint, certified to by the clerk of the United States court.

Helena, Sept. 21, 1893.

WM. F. FURAY,
United States Marshal,
By GEO. A. LECRESSY, *Deputy.*

(Endorsed:) No. 291. (Title of court and cause.) Summons. Filed Sept. 25, 1893. Geo. W. Sproule, clerk.

Sealed with my seal and dated this seventh day of March, A. D. 1884.

The consideration of this obligation is such that, whereas, a certain cause now depending in the district court of the third judicial district, Lewis & Clarke county, Montana, between William
17 Robinson and James Huggins, plaintiffs, and Charles Mayger, defendant, has been compromised and settled, and the said William Robinson and James Huggins have agreed to withdraw certain objections to the application of the said Charles Mayger, for patent, now pending in the United States land office at Helena, Montana.

Now, then, in consideration thereof, and the further consideration of one dollar, to the said Charles Mayger in hand paid, by the said William Robinson and James Huggins and Frank P. Sterling, the receipt of which is hereby confessed, hereby covenants, promises and agrees to proceed at once upon his application now pending in the United States land office at Helena, Montana, for a patent to the St. Louis Lode claim described therein, and situated in Lewis & Clarke county, Montana Territory, and procure as soon as practicable a Government patent therefor, and, when such title shall have been procured according to said application, said Charles Mayger hereby covenants, promises and agrees, upon the demand of the said William Robinson and James Huggins and Frank P. Sterling, or their heirs or assigns, to make, execute and deliver to the said William Robinson, his heirs or assigns, a good and sufficient deed of conveyance of that certain lot, piece or parcel of mining ground situate in Lewis & Clarke county, Montana Territory, and comprising a part of two certain quartz lode mining claims, known as the St. Louis Lode claim and the Nine Hour Lode claim, and particularly described as follows, to wit:

Commencing at a point from which the center of discovery shaft of the Nine Hour lode bears south 39 degrees 32 minutes east, said
18 course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode claim, between corners two and three, two hundred and twenty-six feet (226) to a point on the boundary line of the St. Louis lode between corners one and two; thence south 20 degrees 28 minutes west along said boundary line, between corners one and two, 60.5 feet to corner No. 2, of St. Louis lode, 400.31 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the line of boundary of St. Louis lode, between corners three and four, thirty feet to a point; thence north 50 degrees 28 minutes east along a line parallel to the boundary line of the St. Louis lode, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.50 square feet, together with all the mineral therein contained. And if the said Charles Mayger, his heirs or assigns, shall make, execute and deliver the said deed of conveyance as by this agreement provided and intended, then this bond and agreement to be null and void, otherwise to be and remain in full force and effect.

Witness my hand and seal the day and year first above written.
CHARLES F. MAYGER. [SEAL.]

The name of Frank P. Sterling was inserted in this instrument as one of the obligees before the signing and delivery thereof.
CHARLES F. MAYGER. [SEAL.]

Witness:
J. K. TOOLE.

19 TERRITORY OF MONTANA, } ss:
County of Lewis & Clarke, }

On the seventh day of March, eighteen hundred and eighty-four, personally appeared before me, R. H. Kemp, a notary public in and for the said county of Lewis & Clarke, Territory of Montana, Charles F. Mayger, whose name is subscribed to the annexed instrument as party thereto, personally known to me to be the same person described in and who executed the said annexed instrument as a party thereto, and who duly acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in the certificate first above written.

[NOTARIAL SEAL.] R. H. KEMP,
Notary Public.

Filed and recorded March 8, 1884, at 3 p. m.
O. B. TOTTEN.

EXHIBIT "B."

Deed to St. Louis Mining & Milling Co. of Montana to Montana Mining Co., Ltd.

This indenture, made and entered into this first day of July, in the year of our Lord one thousand eight hundred and ninety-five, between the St. Louis Mining & Milling Company of Montana, an incorporation duly organized under the laws of the State of Montana, by William Mayger of the county of Lewis and Clarke
20 and State of Montana, its duly authorized agent and attorney-in-fact, the party of the first part, and the Montana Mining Company, Limited, an incorporation duly organized under the laws of the Kingdom of Great Britain and Ireland, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to it in hand paid, the receipt whereof is hereby confessed, has granted, bargained, sold, remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part and to its assigns forever, all and singular those certain premises, situate, lying

and being in Ottawa (unorganized) mining district, in the county of Lewis & Clarke and State of Montana, more particularly bounded and described as follows, to wit:

Commencing at a point from which the center of the discovery shaft of the Nine Hour lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode claim, between corners two and three two hundred and twenty-six feet to a point on the boundary line of the St. Louis Lode claim between corners one and two; thence south 20 degrees 28 minutes west along the line of said boundary, between corners one and two, 60.5 feet to corner No. 2; thence 403 feet to corner No. 3 of the St. Louis lode; thence north 46
21 degrees 10 minutes west along the line of boundary of the said St. Louis Lode claim, between corners three and four, thirty feet distant to a point; thence north 50 degrees 28 minutes east along a line parallel to the said boundary line of the St. Louis Lode claim, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.5 feet, together with all the mineral therein contained. Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz rock and earth therein, and all the rights, privileges and franchises thereto incident, appended or appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits therein, and also all and every right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the said premises, with the appurtenances and privileges thereto incident, unto the said party of the second part and its assigns forever.

In witness whereof, the said William Mayger, as attorney-in-fact and agent as aforesaid for the said party of the first part, has hereunto subscribed its name, set his hand and seal this first day of July, A. D. 1895, as its said agent.

ST. LOUIS MINING & MILLING CO., [SEAL.]
By WILLIAM MAYGER,
Its Agent and Attorney-in-fact.

22 STATE OF MONTANA, }
County of Lewis & Clarke, } ss:

Be it remembered that on this first day of July, A. D. 1895, personally appeared before me, Harry H. Yeager, a notary public in and for county of Lewis & Clarke, and State of Montana, the St. Louis Mining & Milling Company of Montana, by and through William Mayger, its duly authorized agent and attorney-in-fact, personally known to me to be the same person described in and who executed the said foregoing instrument as such agent and attorney-

in-fact, who duly acknowledged to me that, as such agent and attorney-in-fact, he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal this the day and year first herein in this certificate written.

[NOTARIAL SEAL.] HARRY H. YEAGER,
Notary Public.

(Endorsed:) No. 291. (Title of court and cause.) Answer to supplemental complaint. Filed and entered June 30, 1899. Geo. W. Sproule, clerk.

23 And thereafter, to wit, on the fourteenth day of July, 1899, the replication of said plaintiff was filed, being as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant. } No. 291.

Replication.

And the said plaintiff, for replication to the answer of the said defendant and the new matter set up by way of estoppel in said defendant's answer, waiving no objections to the competency of the same in this action at law, as to the third paragraph in said answer, denies that plaintiff is estopped for any of the causes or reasons set up in the said answer, or any other cause or reason, from claiming any of the mineral found, or that may be at any time hereafter found, in said thirty-foot strip or compromise ground.

Admits that the said bond was executed as in said answer
24 stated, and avers that the same was executed and made on account of an application of the said Mayger for a patent to the said St. Louis Lode mining claim, and on account of an adverse claim interposed by the said defendant's predecessor in interest of said thirty-foot strip or compromise ground, as being a part of what is known as the said Nine Hour Quartz Lode mining claim.

Admits that the said Mayger agreed to convey said thirty-foot strip or compromise piece of ground, with all the minerals therein contained, to the predecessor in interest of the said defendant, and avers that the said claim of plaintiff comprises no minerals contained in or beneath said thirty-foot strip or compromise ground, except such as is contained in leads, lodes or ledges, which have their tops or apexes within the St. Louis Quartz Lode mining claim, exclusive of said thirty-foot strip or compromise ground.

And the said plaintiff further avers that it is seeking to recover

only such quartz rock or ore and the value thereof, and the damages for the removal and conversion of the same, as comprises lodes, leads or ledges having their tops or apexes within the boundary lines of the said St. Louis Lode mining claim, exclusive of the said thirty-foot strip or compromise ground.

Admits that said Mayger obtained a patent for the said thirty-foot strip or compromise ground, but denies that any conveyance was made by him to plaintiff to defraud any one, and avers that all matters in relation thereto have been concluded by the judgment of the court and the deed mentioned in said defendant's answer executed in pursuance thereof.

25 And the said plaintiff, for further replication to the new matter set up in the said defendant's answer, shows unto this honorable court that the said thirty-foot strip or piece of compromise ground comprised a part and portion of what was known as the Nine Hour Lode claim mentioned in the said defendant's answer, and that no other right or title has been conveyed by reason of the said deed than such as was attached and incident to the said thirty-foot strip or compromise ground, and that the minerals therein contained were intended to comprise and did comprise only such minerals as were contained in veins, lodes, or ledges having their tops or apexes inside of the said thirty-foot strip, all of which will more fully appear by reference to a certified copy of the judgment-roll in the case hereinbefore referred to and filed in the equity suit in aid of this action, and which plaintiff asks may be considered in this cause as though reproduced and fully set forth at large.

And plaintiff alleges the fact to be that the said thirty-foot strip or compromise ground was at all times a part and portion of the quartz lode mining claim, known as the Nine Hour claim, and that the same was never a part or portion of the St. Louis Quartz Lode mining claim mentioned in the complaint herein, and that in an action heretofore pending between the parties hereto in district court of the first judicial district of the State of Montana, in and for the county of Lewis & Clarke, in which said action the defendant herein was plaintiff, and this plaintiff and Charles Mayger, one of its predecessors in interest, were defendants, which said action

26 was based upon the agreement mentioned in said answer and was brought for the purpose of compelling the defendants therein, in accordance with said agreement, to execute and deliver to the plaintiff therein a good and sufficient deed for the premises known as the thirty-foot strip or compromise ground and mentioned in the answer in this action, it was found and determined by the court, as a matter of fact, that the said thirty-foot strip or compromise ground was at all times a part of the said Nine Hour Lode mining claim, and was by the parties to said agreement agreed to be a part thereof, and that the said agreement with the said Charles Mayger, a copy of which is attached to the amended answer herein, was made and given for the purpose of settling and determining and fixing the boundary line between the said Nine Hour Lode mining claim and the St. Louis Lode mining claim, the boundaries of which claims had been and were at the time of the execution of

the said agreement in conflict, and concerning which a controversy then existed between the parties to said agreement; and plaintiff further alleges that the deed mentioned in said answer, and a copy of which is annexed thereto, is the deed which the court adjudged in said action should be executed for the purpose of performing the agreements above referred to.

Wherefore, plaintiff demands judgment as heretofore demanded in its amended and supplemental complaint.

E. W. TOOLE AND
THOMAS C. BACH,
Attorneys for Plaintiff.

27 STATE OF MONTANA, } ss:
County of Lewis & Clarke, }

William Mayger, being duly sworn, deposes and says: That he is an officer, to wit, the superintendent and general manager of the above-entitled plaintiff, which is a corporation; that he has read the foregoing replication, and knows the contents thereof; and that the matters stated therein are true to his best knowledge, information and belief.

WILLIAM MAYGER.

Subscribed and sworn to before me this fourteenth day of July, 1899.

[SEAL.] HARRY HARRIS,
Notary Public in and for Lewis & Clarke County, Montana.

Due and timely service of a copy of this replication acknowledged and admitted this fourteenth day of July, 1899.

CULLEN, DAY & CULLEN,
Attorneys for Defendant.

(Endorsed:) No. 291. (Title of court and cause.) Replication. Filed and entered July 14, 1899. Geo. W. W. Sproule, clerk.

28 And thereafter, to wit, on the twelfth day of August, 1899, the verdict of the jury was filed herein, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Verdict.

We, the jury in the above-entitled cause, do find our verdict in favor of the plaintiff and for the sum of twenty-three thousand two hundred and nine dollars ($23,209.00).

T. H. CLEWELL, *Foreman.*

(Endorsed:) No. 291. (Title of court and cause.) Verdict. Filed and entered August 12, 1899. Geo. W. Sproule, clerk.

29 And thereafter, to wit, on the sixteenth day of August, 1899, a judgment was duly entered herein which is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Judgment.

Be it remembered, that on this seventh day of August, A. D. 1899, the above-entitled cause coming on for hearing, and the same having been duly submitted to a jury of twelve lawful men, duly impaneled and sworn to try the issue herein, the following verdict was duly returned into court, to wit:

30 "In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Verdict.

We, the jury, in the above-entitled cause, do find our verdict in favor of the plaintiff and for the sum of twenty-three thousand two hundred and nine dollars ($23,209.00).

T. H. CLEWELL, *Foreman.*"

It is therefore considered, ordered and adjudged that the said plaintiff have and recover of the said defendant the said sum of twenty-three thousand two hundred and nine dollars ($23,209.00), together with its costs in this behalf expended, taxed at the sum of ninety-five and sixty-five one-hundredths dollars, and that it have execution therefor.

Dated August 16, 1899.

Entered August 16, 1899.

[SEAL.] GEO. W. SPROULE, *Clerk.*

Attest: A true copy of judgment as entered.

[SEAL.] GEO. W. SPROULE, *Clerk.*

31 In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff, *vs.* MONTANA MINING COMPANY, LIMITED, Defendant. } No. 291.

Clerk's Certificate to Judgment-roll.

I, George W. Sproule, clerk of the circuit court of the United States, for the ninth judicial circuit, district of Montana, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said circuit court, this sixteenth day of August, 1899.

[SEAL.] GEORGE W. SPROULE, *Clerk.*

(Endorsed:) No. 291. (Title of court and cause.) Judgment-roll. Filed Aug. 16, 1899. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 28th day of August, A. D. 1899, a bill of exceptions was duly allowed, signed and filed, which is as follows, to wit:

32 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff, *vs.* MONTANA MINING COMPANY, LIMITED, Defendant.

Bill of Exceptions.

Be it remembered that this cause came on for trial before a jury on the 8th day of August, 1899, that being one of the days of court of the April term, 1899, of the said circuit court. The jury was duly impaneled and sworn to try the case and thereupon the following proceedings were had.

WILLIAM MAYGER, was called as a witness for plaintiff, and having been duly sworn, testified substantially as follows: I am the superintendent and general manager of the plaintiff company, the St. Louis Mining and Milling Company, have filled that position since 1887. I am acquainted with the discovery vein of the St. Louis claim; that is not the vein which is in controversy here; the discovery vein is the one upon which the location was made.

The witness then referred to the map which was afterward
33 introduced in evidence and marked "Plaintiff's Exhibit No. 1;" continuing, the witness testified as follows: The discovery vein of the St. Louis claim runs nearly parallel with the

side lines of the claim, and runs very nearly at right angles to the end lines of the claim, which are marked on the map 3 and 4, and 1 and 6; the discovery vein dips toward the east, the Nine Hour mining claim; that vein was followed out toward the south to between fifty and seventy-five feet from the south end line, and north of the discovery shaft the vein runs also nearly parallel with the side lines in a northerly direction 300 or 400 feet. I know the end lines as located and patented; on the map, the north end line is the one marked corner No. 1, and corner No. 6; and the south end line is marked corner No. 3 and corner No. 4. I have pointed out to Mr. Keerl the discovery vein of the St. Louis claim.

I have read the answer in this case and the copy of deed annexed thereto. I executed that deed in behalf of the plaintiff company.

The witness was then asked the following question:

Q. Under — circumstances was that deed executed?

To which counsel for defendant objected and stated to the court: "If that is evidence anywhere it is evidence in rebuttal and not on the direct case."

The court sustained the objection, and in so ruling said, "I will sustain the objection at this time."

Thereupon plaintiff called JAMES S. KEERL as a witness, who, having been duly sworn, testified substantially as follows: I am a civil engineer and have been for about twenty-three years;
34 I am familiar with underground surveying. I have surveyed the premises known as the St. Louis claim, and the premises adjoining that claim on the east, and known as the Nine Hour claim; that survey covered the surface as well as the underground workings; I have made a map of that survey and produce it.

Referring to the map, the witness pointed out corners 1, 2, 3, 4, 5, and 6 as shown thereon.

Continuing the witness said: I got these numbers from the patent, and they correspond with the numbers on the patent.

The witness then pointed out the different corners, open cuts, tunnels, and other workings on the mines referred to as indicated on the map, and added that the shaded portions represent shafts that are sunk on the wall; weak shadings indicate stopes; full black lines show workings underground; light black lines indicate open cuts.

The witness testified that the map was a correct representation of the country which it purported to represent and was drawn to a scale of ten feet to the inch. The map was then introduced in evidence and marked "Plaintiff's Exhibit No. 1." (Here insert map.)*

Continuing, the witness testified substantially as follows: I am

*Under rule 34, map in custody of United States marshal. See, also, stipulation, page 93 of this record.

familiar with the vein in controversy in this case. The line marked on the map "Projected line parallel to end line, 520-ft. plane," is a line drawn 520 feet from corner No. 1 and parallel to the end line of the St. Louis claim.

35 The line marked "Projected line parallel to end line, 108-ft. plane," is drawn parallel to the end lines of the St. Louis claim, 108 feet south of the point at which the west side line of the compromise ground intersects the east side line of the St. Louis claim.

The line marked on the map "Projected line parallel to end line, 133-ft. plane," is drawn parallel to the end lines of the St. Louis claim, and is twenty-five feet south of the 108-foot plane.

The line marked "West side line of thirty-foot strip" was determined by surveying a line thirty feet in width parallel with the line marked 2 and 3.

It was admitted by counsel that that portion of the map included between the last-mentioned line and the line marked on the map by the numbers 2 and 3, and the two lines crossing said lines, correctly represent what is known as the thirty-foot strip or compromise ground, and form the premises described in a deed, a copy of which is annexed to the answer herein.

Proceeding, the witness testified as follows: I made an examination on the underground workings on the vein known as the Drum Lummon vein, and which is indicated on the map as commencing at the words "raise 1885," and south of the 520-foot plane, and continues in a general southerly direction along the easterly line of the St. Louis claim as shown on the map, and I have made measurements of the underground workings north of the plane known as the 108-foot plane, and designated on the plat and up to a point where the 520-foot plane intersects the east side line of the

36 St. Louis claim. I have made different calculations of the amount of ore taken out east of the line known as the west side line of the thirty-foot strip, and between the plane known as the 108-foot plane and a plane parallel thereto, intersecting the point at which the easterly boundary of the St. Louis claim intersects the westerly boundary line of the thirty-foot strip.

Thereupon, the plaintiff offered in evidence the judgment-roll being "Plaintiff's Exhibit No. 2," hereinafter fully set forth, together with a stipulation hereinafter set forth, both of which papers are hereby referred to but are omitted at this point for the purpose of reducing the record as far as possible, to which evidence the defendant objected, upon the ground that it was not the proper time for the introduction of the same; which objection was by the court sustained. To which ruling of the court plaintiff then and there duly excepted.

The witness then continued his testimony as follows: In making my calculations of the ore taken out of the Drum Lummon vein to the east of the line marked "West side line of the thirty-foot strip," and between the plane marked "108-ft. plane" and a plane parallel

thereto, and intersecting the east side line of the St. Louis claim at a point where the west side line of the thirty-foot strip intersects said line, I have given the different excavations by block numbers.

The witness then testified that the amount of ore taken from the points above described amounted in all to 376.2 cubic feet and to 4,889.9 tons of ore, and then described certain tunnels which
37 were run by the defendant company on the Drum Lummon vein between the planes known as the 520-foot plane and the 108-foot plane. The witness was then asked this question:

Q. I will ask you now, Mr. Keerl, if you made any measurements of the ore extracted from this vein between the 108-foot plane and the 133-foot plane, and east of the west line of the thirty-foot strip.

To which testimony defendant objected in these words: Defendant objects to that, your honor; as we understood you yesterday to say that in the Doe and Waterloo case in the circuit court of appeals, in an opinion written by yourself, in order to give extralateral rights there must be the whole of the apex in there; in other words, they could not split the apex. If that is to be the ruling there is no necessity of going south of this. Defendant objects as being wholly immaterial under the pleadings. No right is claimed by virtue of that second projected parallel end line in the complaint—the line at the 108-foot plane; that is, as far as any right is claimed, and the ore extracted is between the two planes.

Which objection was sustained by the court. To which ruling of the court plaintiff then and there duly excepted,

Plaintiff then offered to prove that between the plane known as the 108-foot plane and the plane known as the 133-foot plane, as marked on the map, and easterly of what is known as the westerly side line of the thirty-foot strip, and from the Drum Lummon lode, which has a part of its apex within the St. Louis ground proper, exclusive of the thirty-foot strip, and between the planes aforesaid, the defendant has, on the dip of said vein, extracted ore from
38 said vein to the amount of one hundred and fifty thousand dollars. To which evidence the defendant objected, on the ground that the same is immaterial and irrelevant in this, that the point of extraction is beyond the line shown by the pleadings in this case to have been agreed upon as the boundary line between the two claims, and beyond the point where the plaintiff alleges that it has the entire apex of the vein; which objection was by the court sustained. To which ruling plaintiff then and there duly excepted.

Continuing, the witness testified that the above measurements given in his testimony were taken by himself and John R. Parks, and that a small portion of the ore between the planes and from the vein aforesaid and west of the west line of the thirty-foot strip, a small portion of the ore taken by the defendant company amounted to 28.8 cubic feet or 2.2 tons,

Thereupon the plaintiff called JOHN R. PARKS, who, being duly sworn, testified substantially as follows:

That he is a consulting mining engineer, and has been in that business since 1880; that he had been consulting engineer with the St. Louis Mining and Milling Company for the last nine years; that he was also an assayer; that he had examined the underground and surface workings involved in this suit; that he was familiar with the discovery point of the St. Louis claim; that it is connected with the discovery vein, and that the discovery vein runs in a general direction parallel to the side lines of the St. Louis claim; that the said vein has been developed to within seventy feet from
39 the south end line of the claim, and that, in his opinion, it crosses the said south end line; that the vien runs, in his opinion, north and passes out of the north end line of the St. Louis claim, and that the said vein dips to the east; that there is another vein, a portion of which has its apex within the St. Louis claim, and that said vein is known as the Drum Lummon. The witness testified that he was familiar with the plane testified to and shown on the map as the 520 plane, and that at that point the hanging wall and the foot wall of the Drum Lummon vein were within the surface boundaries of the St. Louis claim, and thence continued southerly within the St. Louis claim, both hanging and foot wall, and that its dip was to the east; that the said vein had its entire apex within the surface boundaries of the St. Louis claim proper from the point mentioned down to the point known as the point where the 108-foot plane intersects the west side line of the compromise ground or thirty-foot strip, which point is 108 feet south of the intersection of the west line of the compromise ground with the east line of the St. Louis claim; that at said point the hanging wall of the vein passed out of the St. Louis claim proper and into the said compromise ground or thirty-foot strip; that the foot wall continued beyond that point within the St. Louis claim proper and west of the thirty-foot strip for some distance beyond the plane known as the 133-foot plane; that the said wall had been traced wholly within the St. Louis ground property and west of the thirty-foot strip to a
40 point 301 feet south of the point of intersection of the east side line of the St. Louis claim with the west side line of the thirty-foot strip.

Continuing, the witness testified that he had been in the underground workings between the 108-foot plane and the plane known as the 520-foot plane and had ascertained the amount of ore taken out by the defendant company from the Drum Lummon vein between the planes aforesaid and underneath the surface of the Nine Hour claim, including the thirty-foot strip or compromise ground, and that these measurements were made in July, 1899; that he assisted Mr. Keerl in making the measurements to which he had already testified; that he was unable to get at the ore taken out by the defendant, so was obliged to take his samples of each block from ore remaining in each block, and that he took the samples as near as possible to each of the places from which the ore was so taken out; that the amount so taken out was as above stated by the wit-

ness Keerl; that he had carefully assayed these samples for the purpose of ascertaining the value of the ore taken out per ton, and that the value of the ore so taken out from the block described was thirty thousand nine hundred and ninety-eight dollars ($30,998.00).

Proceeding, the witness testified that he had measured the ore taken from the Drum Lummon vein by the defendant, east of the east side line of the St. Louis claim proper and between the plane known as the 108-foot plane and the 133-foot plane, a portion of said ore being a part of the said vein lying east of the compromise ground, and the rest being part of the vein within that
41 ground; that there were four blocks of such ore taken out by defendant east of the compromise ground, which he had numbered blocks 3, 4, 5, 6 and 7.

The witness was then asked the following question:

Q. Tell us about block 3—how many cubic feet in that?

To which question the defendant objected, on the ground that the same is immaterial and irrelevant, for the reason that, according to the pleadings of plaintiff in this action, they are beyond the agreed boundary lines between the claims. This is the same objection which was made to similar testimony on the part of Mr. Keerl; which objection was by the court sustained. To which ruling of the court the plaintiff then and there duly excepted. The witness further testified that all of the measurement samples so taken by him were taken in the presence of employés of the defendant by it designated to accompany him at that time.

The plaintiff then called WALTER PROCTOR JENNEY as a witness, who, being duly sworn, testified substantially as follows:

I am a mining engineer and consulting geologist, and have been for thirty years, and during that time have frequently examined and reported upon mines of all kinds. I have examined the St. Louis and the Drum Lummon veins, the property in controversy, for twenty days in the field; I have examined the openings on the St. Louis claim, and those upon the Nine Hour. I have examined the discovery of the St. Louis claim; it is connected with a
42 vein—the vein named the Discovery vein. It is developed by a tunnel to a point about ninety-five feet, as shown on the map, from the south end line of the claim. The tunnel is in ore all the way; the vein is a strong vein; the dip is nearly vertical; going north the vein is strong. I examined the vein for the purpose of determining if it passed through the north end line or not; I am of the opinion that it does.

I have carefully examined the Drum Lummon vein; I find it in part in the St. Louis claim; the entire apex of the vein on its course, hanging wall and foot wall, is entirely within the St. Louis surface ground between the planes mentioned in the complaint as the 520-foot plane and the 108-foot plane; the hanging wall passes out at the point where the 108-foot plane intersects the east side line of the St. Louis claim as now possessed—that is the west side line of the thirty-foot strip; the foot wall passes through the 108-foot plane,

going southerly; it is not determined accurately where the foot wall passes out of the St. Louis ground, but it is still within the St. Louis ground west of the west side line of the compromise ground at a point south of the 133-foot plane.

The defendant then moved to have the testimony with reference to the foot wall stricken out, on the ground that it is immaterial and irrelevant and is contradictory to the pleadings which allege that the foot wall passes out at the 133-foot plane; which motion was sustained. To which ruling of the court the plaintiff then and there duly *executed.*

43 The witness then testified that the Drum Lummon vein passed beyond the 108-foot plane northerly within the St. Louis claim and passed out of the north end line of that claim.

The defendant thereupon moved to strike this testimony out; which motion was granted by the court. To which ruling plaintiff then and there duly excepted.

The witness Jenney further testified that the dip of the Drum Lummon vein is in an easterly direction.

MILLIAM MAYGER, being recalled, testified substantially as follows: That the ore bodies testified to as blocks 8, 9 and 10 by the witnesses Keerl and Parks were taken out by the defendant and within the times mentioned in the second amended and supplemental complaint herein; that portion of this ore was removed by defendant and placed in a level in the Nine Hour ground driven by defendant and dropped into the lower workings of the defendant company.

Whereupon the plaintiff rested.

Defendants called and had sworn DAVID HERRON, a witness of lawful age, who testified as follows:

I reside at Marysville. I am surveyor for The Montana Mining Company, Limited, the defendant. I am familiar with the works of the Montana Mining Company in and about the points where the one hundred and eight foot line crosses the compromise ground, and I am familiar with those portions of the ground testified to by the witness Keerl and the witness Parks as blocks 8, 9, 10 and 11. I have made a survey of the ground and a map of it.

44 Whereupon the witness produced map marked "Defendant's Exhibit No. 3," which said map was offered and received in evidence, and is as follows, to wit (here insert map):*

The portions colored blue in the longitudinal section are the stopes of the defendant, and those colored red are the stopes of the plaintiff. The line A B is the projected end line drawn parallel to the end lines of the St. Louis claim. The line C D is the projection of the west boundary line of the thirty-foot strip. The portion of the map left not colored is the ground not stoped.

* Under rule 34, map in custody of United States marshal. See, also, stipulation page 93 of this record.

Defendant likewise called and had sworn one C. W. GOODALE, a witness of lawful age, who testified as follows:

I am by profession a mining engineer. I am at present superintendent of the smelter of the Boston & Montana Company at Great Falls. I am familiar with the ground here in controversy. I first visited the Nine Hour workings in April and May, 1893. I first saw the Montana Company's apex shaft in June, 1893. At that time it was about thirty or thirty-five feet deep. At the time I first saw it no connection had been made with the plaintiff's twenty-foot level, but when I saw the ground again about the twenty-first of September the level had been driven into the shaft and a brattice or bulkhead had been put in on the westerly line of the compromise ground. I have gone down the apex shaft to the lower workings upon the compromise strip and upon the Nine Hour at different times. I was in the one hundred and ninety foot level in
45 April or May, 1893. On my return from the East, about the twentieth of September, the drift in this level had been extended about thirty-five or forty feet north from where it was when I first saw it. It was the ordinary size of a mining drift—about seven feet high and four and a half or five feet wide. I examined the material which came out of that drift. It was a very low-grade quartz or vein matter, carrying no copper stain. There was no stoping done in the level, but a little overcutting was done and timber put in to prevent it from caving. I was in this level a few days since. There was quartz in the back of the drift, a very low-grade looking material. There would be no difficulty in getting a sample from it of the material in the drift, and the material that could be obtained would be a fair average sample of what came out of the drift. The pay chutes in the Drum Lummon trend in a southerly direction. A sample taken from a point in the winze one hundred feet above the one hundred and ninety foot level would not fairly represent the material taken out in running the level it would be in much higher-grade ore. At the point where Prof. Parks says he took the sample, the ore is of high grade, while in the one hundred and ninety foot level it was poor.

Cross-examination:

I made the affidavit which you now show me sworn to on September 23, 1893. I made this statement: "I have made a careful examination of the stoping done by the said Montana Company, Limited, and its predecessor in interest in the Nine Hour ground, and while there is no direct connection between the said stoping and
46 the said shaft, called the Montana Company's apex shaft, I am quite satisfied that no ore has been stoped from any ground lying to the north of the line drawn through a point where the strike of said lode probably crosses said compromise line, parallel with the south end line of plaintiff's said St. Louis Lode mining claim." The point at which I testified according to this affidavit that no work was done would be north of where the line goes out now. The point where I thought the vein passed out at that time was twenty feet, more or less, from the Montana Company's apex shaft and to

the north of the one hundred and eight foot line as now drawn down.

Redirect examination:

I last examined block 9 on the seventh of August, this week. I climbed up from the eighty-five-foot level and above the forty-six. I climbed up on the brattice and caved ground and identified the top of this brattice which has been described. I climbed up to the surface, and it is my opinion that the block called block No. 9 has not been removed; that it is still there. There is certainly a triangular piece of ground or cone there. I climbed up to the surface and identified the brattice described, and from what I have seen on the north side of the Montana Company's apex shaft I do not believe that material was used. I think the pillar of ground above the twenty-foot level of the St. Louis Company and between the red stope shown on the Montana Company's map on the apex shaft and extending to the face has not been removed.

47 Defendant also called and had sworn ALEXANDER BURRELL, a witness of lawful age, who testified as follows:

I am a miner. I have been engaged in that business for about twenty-five years. I have been connected with the Drum Lummon since 1888. I was mine superintendent up to April, 1897, since which time I have been manager. We commenced sinking the Montana Company's apex shaft on the first day of June, 1893, and sunk it down to a depth of about thirty-five feet, when we were obliged to stop from the fact that the St. Louis Company's eighteen-foot drift was approaching so near that the shots made it not safe to work in the shaft. On the twenty-fifth of June they broke through into our apex shaft. We then stopped them from coming in, and after they had knocked a hole through we put in a brattice within about a foot of the line. We left about a foot to be sure. We also put in two short stulls. That is all the stoping we did there, and we left the material in the bottom of the shaft and on the floor of the drift. At that time no stoping of the ground had been done by the Montana Company, or by anybody, north of the apex shaft along the line of the compromise ground. I have had continuous control of the operations of the property since and no ore has been removed by anybody over whom I had control north of the apex shaft and within the ground which plaintiff calls its block No. 9. The ground has caved in and dropped into the stope, part on one side of the line and part on the other. I think the greater part is on plaintiff's forty-six-foot level. No ore has been taken by
48 either of the companies with which I have been connected out of what plaintiff claims as block No. 9. In block No. 8 we commenced work immediately after the decision of the Supreme Court of the United States granting us the title to that strip of ground with all the mineral therein contained, which was about a year ago—probably in October or November last. I do not know whether we worked any ore from blocks No. 8 and 11 prior to the service of the injunction. That would have to be determined by

the amount left in the upraise that is not taken out, but I have estimated that possibly we milled forty or fifty tons of that ore before the order reached us. The ore that was in the chute we were allowed to remove and bring to the surface, and I have rendered a statement of that ore to this court. There was about sixty tons of it. The balance of the ore that came out of blocks 8 and 11 is in the upraise above the one hundred and ninety foot level. It is in the St. Louis winze sunk from their forty-six-foot shaft to the eighty-five-foot, as continued down by us. The ore is in that winze lying along the bottom of the drift or raise—it is about half full.

Block No. 10 was driven by us at the time the St. Louis Company sunk its winze from the forty-six-foot level. We could hear them working from the stope, and, not knowing what their intentions were, we started this level out to intercept them. The work of driving this level was stopped on the thirtieth day of August, 1893. The level as driven in what is called block 10 was of a regular size—
49 six and a half or probably seven feet and a half by five or six feet in width. I saw the material that came out of there every day. It had no mineral value, and was not worked in the mill. It was put into the level just south of our main Nine Hour shaft. I never saw a particle of copper stain in it. The ore in the Drum Lummon mine trends to the south. Starting at the top and going at right angles to the dip the ore would decrease in value as you go deep. I have heard the testimony of Mr. Parks about taking a sample in the winze one hundred feet above block 10. A sample taken out of that point would not represent the value of the ore taken out of the level, by any means. You might as well go across the range and get a piece of ore as to go there, because of the character of the ground. The trend of the ore body is to the south and the stopes on the one hundred and ninety foot level as you go northerly leave the pay ore. There is no pay ore over the back of the level at the edge of the stope. The material that is in the level now is similar to that taken out, and you can get from block 10 an average of what was taken out. The back of the level should be a better grade really than the entire material taken from the drift, because the top is nearer the bottom of the southern trend than the bottom of the drift, corresponding to its height. There has never been any stoping done in that part of the one hundred and ninety foot level known as block 10. The custom is to take out samples every morning from all places where they are working in the mine, tie them up and mark them and send them to the assay office to know whether ore or waste; there was no exception in this case.

Cross-examination:

50 Only part of the material of block 8 remained in the winze; some of it was passed through the winze; some we carried away and milled.

The material that came out of block 10 was deposited probably one hundred and eighty or two hundred feet south of the point in the level where it came out. That part of the mine has caved and

it probably went down in the waste cave or old original stope. We carried the ore from block No. 10 to the south of the Nine Hour shaft; it is caved down into the works of the Nine Hour. The same disposition was made of the material that came out of block 11 as that which came out of block 8; it was carried into the works of the Nine Hour lode. I know where the two-hundred-foot raise is. We did not stope to the north at that point.

Defendant also called and had sworn JOHN HERRON, a witness of lawful age, who testified substantially as follows:

I am a civil engineer by occupation. I have followed that business for about twenty years. I was for five and a half years at Marysville in the employ of the Montana Mining Company. While there I became acquainted with the mining claims in controversy. I know the Montana Company's apex shaft, plaintiff's twenty-foot level, and I know that the apex of the Drum Lummon lode is at that point. There has been no work done by the Montana Company above the twenty-foot level north of its apex shaft, unless it
51 was a little timbering. There was no stoping done there and no ore taken out there. I am acquainted with the one hundred and ninety foot level in defendant's ground. While the level was being run northerly from the one hundred and eight foot line I was in it nearly every day. The material which came out was waste, and was carried south into the level and dumped in the bottom of the drift. None of it was worked.

On cross-examination the witness testified that some of the material taken out in block 8 was milled.

Defendant also called and had sworn one WILLIAM M. PHILLPOTTS, a witness of lawful age, who testified substantially as follows, to wit:

I am a mining engineer. I have been with the defendant company for the last five years. I am acquainted with the one hundred and ninety foot level. It is about thirty-five feet long; about twenty-seven or twenty-eight feet of it at the north end is open. The southerly ten or twelve feet of it is filled up. I gained access to it from plaintiff's eighty-five-foot level. I went down the raise from that level into the one hundred and ninety foot level. There is quartz and vein matter in the back of the level. I took a sample of it, or rather I took six samples. I took the first one twenty-three feet south of the north face. The second one is a sample of the pile of ore that lies in the drift; the third one is a sample taken sixteen feet south of the north face; the fourth one about twelve feet south of the north face, and the fifth one is six feet south of the north face, and the last one is a sample of the face.

52 (Here the witness produced the samples for exhibit to the jury.)

I am an assayer and I assayed these samples. No. 1 assayed .12 oz. in gold and 1.6 oz. in silver—value in gold, $2.48; silver, $.96; total, $3.44. No. 2 contained .11 oz. in gold and 1.9 oz. in silver; total value, $3.41. No. 3 contained .12 oz. in gold, 1.5 oz. in silver;

total, $3.38. No. 4, trace of gold and .7 oz. silver; total value, $.42. No. 5, a trace of gold and 1.5 silver; total value, $.30. No. 6, .02— gold and .8 oz. silver; total value, $.89.

I heard the testimony of Mr. Parks and heard him describe the point from which he took the sample that he assayed as a sample of the contents of this block No. 10. It would not represent the value of that block at all, as it is not taken anywhere near that point.

Upon cross-examination the witness testified that when he took the samples referred to by him, no one was present except the agents of defendants; and no notice was given to plaintiff when he intended to take these samples. Thereupon defendant rested.

Rebuttal:

The plaintiff thereupon offered in rebuttal the complaint and exhibit attached thereto, the answer the findings and judgment of the court in the case in the district court of the first judicial district of the State of Montana, wherein The Montana Mining Company, Limited, was plaintiff and the plaintiff herein was defendant, which papers have been offered in evidence heretofore in this case and marked "Plaintiff's Exhibit No. 2," are as follows, to wit:

53 PLAINTIFF'S EXHIBIT No. 2.

(Title of Court, Title of Cause.)

Complaint.

The plaintiff complains of the above-named defendants and for cause of action alleges:

I.

That this plaintiff is an incorporation duly organized and existing by and under the laws of the Kingdom of Great Britain, and is doing and entitled to do business in the State of Montana, by virtue of its compliance with the laws of this State regulating foreign corporations.

That the above-named defendant, The St. Louis Mining & Milling Company of Montana, is and was at the several dates hereinafter mentioned likewise an incorporation organized and existing by and under the laws of said State of Montana.

II.

And the plaintiff further shows and alleges that on and prior to the seventh day of March, A. D. 1884, plaintiff's predecessors in interest, to wit, one William Robinson, James Huggins and Frank P. Sterling, Warren De Camp and John W. Eddy, who were then and there all citizens of the United States and duly qualified mineral-land claimants, were the owners of, in possession of, and lawfully entitled to the use, occupation and possession of all and singular that piece or parcel of mining ground, comprising a portion of
54 the Nine Hour Lode mining claim, situate, lying and being in Ottawa (unorganized) mining district, in the county of

Lewis & Clarke, and State of Montana, more particularly described as follows, to wit:

Commencing at a point from which the center of discovery shaft of the Nine Hour lode bears south 39 degrees, 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence north 50 degrees, 28 minutes east, on a line parallel to the aforesaid boundary line of the St. Louis Lode claim, between corners two and three, two hundred and twenty-six feet to a point on the boundary line of the St. Louis Lode claim, between corners one and two; thence 20 degrees and 28 minutes west along the line of said boundary, between corners one and two, 60.5 feet to corner No. 2; thence 408 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the line of boundary of said St. Louis Lode claim, between corners three and four, thirty feet distant to a point; thence north 50 degrees 28 minutes east along a line parallel to the boundary line of the St. Louis Lode claim, between corners two and three, 230 feet to the point of beginning, including an area of about 12,884.5 feet, together with all the mineral therein contained; that thereafter, in causing to be surveyed for a patent his St. Louis Lode mining claim, the above-named defendant, Charles Mayger, had wrongfully extended, and caused to be extended, the easterly boundary line of his said mining claim over the premises so above mentioned and particularly described, which said premises were then, and ever since the twenty-sixth day of July, 1880, have been, a part
55 of the Nine Hour Lode mining claim, so the property of the aforesaid predecessors in interest of this plaintiff, and of which said portion and of the whole of said mining claim they were then and there the owners, in the actual possession and entitled to the possession thereof. And thereupon said defendant, Charles Mayger, having wrongfully made application in the United States land office at Helena, Montana, to enter said premises as a part and portion of his said St. Louis mining claim, the said Robinson and Huggins duly made and filed in said land office a protest and adverse claim thereto, and thereafter and within the time allowed by law for such purpose, they commenced an action in the district court of the third judicial district of the Territory of Montana, within and for the county of Lewis & Clarke, to determine the right to the possession of said premises. In the said action so commenced as aforesaid the said William Robinson and James Huggins were plaintiffs and the above-named defendant, Charles Mayger, was defendant therein, and the said court had jurisdiction to determine the subject-matter of said action; that thereupon, and on the seventh day of March, A. D. 1884, to settle and compromise the said suit and adverse claim and for the purpose of settling and agreeing upon the boundary line between the said Nine Hour Lode mining claim and the said St. Louis mining claim, the said defendant, Charles Mayger, made, executed and delivered to said Robinson, Huggins and Sterling a certain bond for a deed in writing, whereby, in consideration of the
56 compromise and settlement of said lawsuit and the withdrawal of said protest and adverse claim in the said land office, so

that he might procure a United States patent, he thereby covenanted and agreed that when he should obtain such patent, and on demand of the said William Robinson, James Huggins and Frank P. Sterling, or their heirs or assigns, he would make, execute and deliver to them, their heirs or assigns, a good and sufficient deed of and for all the premises so above particularly mentioned and described, a copy of which said bond for a deed is hereunto annexed marked Exhibit "A," and hereby made a part of this complaint.

III.

And plaintiff further shows and states that thereupon the said Robinson and Huggins dismissed their said suit in said district court, withdrew their said adverse claim in said land office, and duly performed on their part all of the terms and conditions of said contract to be by them kept and performed; that the said Charles Mayger thereupon proceeded with his application to enter said St. Louis mining claim, and thereafter an United States patent was duly issued to him for said St. Louis Lode mining claim as surveyed, and included therein that portion of the Nine Hour Lode mining claim above particularly mentioned and described, but no notice was given to this plaintiff or any of its predecessors in interest of the issuance of said patent, until on or about the — day of November, 1889. That upon the execution of said bond for a deed the said predecessors in interest of this plaintiff were in possession of the premises above mentioned and described, and they and their successors
57 in interest ever since have been and yet are in the possession thereof, holding, using and enjoying the same as a part and portion of said Nine Hour Lode mining claim.

IV.

And plaintiff further shows and states that by mesne conveyance the title to the said Nine Hour Lode mining claim and the whole and every part thereof, including the portion thereof above particularly mentioned and described has come to it, and it is now the owner thereof and in the possession and entitled to the possession of the whole and every part of said Nine Hour Lode mining claim; that being so the owner of said mining claim, and being so entitled to a conveyance of the portion thereof above particularly mentioned and described, this plaintiff, on or about the — day of July, A. D. 1893, demanded of and from the said defendants that they make, execute, and deliver a good and sufficient deed to it of and for the premises above mentioned and described, in compliance with the terms and conditions of the said bond, no demand for the execution of said deed having been previously made by said plaintiff or any of its predecessors in interest; but the said defendants then and there refused and ever since have neglected and refused to make, execute or deliver said deed, though often requested so to do.

V.

And plaintiff further shows and states that not only has the said defendant, Charles Mayger, refused and declined to comply with the

request of the plaintiff that he make and execute to it a deed
58 for the said premises above particularly described, as in and by said bond for a deed he covenanted and agreed to do, but on or about the tenth day of June, A. D. 1893, for an alleged consideration of one thousand dollars, he made, executed and delivered —of and for said premises to the said defendant, the St. Louis Mining & Milling Company of Montana, but plaintiff avers that at the date of the execution of said deed the said defendant, The St. Louis Mining & Milling Company of Montana, had full knowledge and notice of the making, execution and delivery of the said bond for a deed by its said codefendant and of the rights and equities of plaintiff thereunder as being the successors in interest of the said Robinson, Huggins, Sterling, and its other grantors.

And plaintiff further alleges that the said defendants have conspired and confederated together for the purpose of cheating, wronging and defrauding this plaintiff out of the said premises, and to that end the said defendant and the St. Louis Mining & Milling Company of Montana has instituted a number of suits in the circuit court of the United States within and for the district of Montana, in which it claims that it is the owner of the remises above particularly described by virtue of the deed so wrongfully and fraudulently made, executed and delivered to it by its said codefendant, as aforesaid, and in which said actions it claims the right to recover large sums of money for ores therein alleged to have been wrongfully mined from said premises by this plaintiff; that in order to successfully defend itself against said suits and in order
59 to remove the cloud from plaintiff's title to said premises caused by the execution of the said deed to the said defendants, The St. Louis Mining & Milling Company of Montana, it is necessary that the said defendants should be compelled to make, execute and deliver to this plaintiff a deed for the said premises, as in equity and good conscience they ought to do.

Wherefore, the premises considered, plaintiff prays that by the proper order or decree of this court the said defendants be adjudged and decreed to make, execute, and deliver to plaintiff a good and sufficient deed for the said premises above mentioned and described, and that in the event of their failure so to do the decree of this honorable court may have the force and effect of such deed; that plaintiff may have such other and further relief as may be in accordance with equity and good conscience, and that it have judgment for its costs.

M. KIRKPATRICK AND
CULLEN & TOOLE,
Plaintiff's Attorneys.

Duly verified by Jos. K. Toole, as attorney, on September 5, 1894, before W. E. Cullen, Jr., notary public, Lewis & Clarke county, Montana.

EXHIBIT "A."

Mayger to *Robinson et al.* } Deed.

Know all men by these presents, that I, Charles Mayger, am held and firmly bound unto William Robinson and James Huggins and Frank P. Sterling in the sum of fifteen hundred dollars,
60 for the payment of which, well and truly to be made, I hereby bind myself, my heirs, executors, administrators, and assigns, firmly by these presents.

Sealed with my seal and dated this seventh day of March, A. D. 1884.

The consideration of this obligation is such that, whereas, a certain cause now depending in the district court of the third judicial district, Lewis and Clarke county, Montana, between William Robinson and James Huggins, plaintiffs, and Charles Mayger, defendant, has been compromised and settled, and the said William Robinson and James Huggins have agreed to withdraw certain objections to the application of the said Charles Mayger for patent now pending in the United States land office at Helena, Montana.

Now, then, in consideration thereof, and the further consideration of one dollar to the said Charles Mayger in hand paid by the said William Robinson and James Huggins and Frank P. Sterling, the receipt of which is hereby confessed, hereby covenants, promises and agrees to proceed at once upon his application now pending in the United States land office at Helena, Montana, for a patent to the St. Louis Lode claim described therein and situated in Lewis & Clarke county, Montana Territory, and procure as soon as practicable a Government patent therefor, and when such title shall have been procured according to such application said Charles Mayger hereby covenants, promises and agrees, upon the demand of the said William Robinson and James Huggins and Frank P. Sterling,
or their heirs or assigns, to make, execute and deliver to
61 the said William Robinson, his heirs or assigns, a good and sufficient deed of conveyance of that certain lot, piece or parcel of mining ground situated in Lewis & Clarke county, Montana Territory, and comprising a part of two certain quartz lode mining claims known as the St. Louis Load claim and the Nine Hour Lode claim, and particularly described as follows, to wit: Commencing at a point from which the center of discovery shaft of the Nine Hour lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners 2 and 3, 50 feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the said St. Louis Load claim, between corners 2 and 3, 226 feet to a point on the boundary line of the St. Louis lode, between corners 1 and 2; thence south 20 degrees 28 minutes east along said boundary, between corners 1 and 2, 60.6 feet to corner No. 2 of the

St. Louis lode, 40.031 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the boundary of St. Louis lode, between corners 3 and 4. 30 feet to a point; thence north 50 degrees 28 minutes east along the line parallel to the boundary line of the St. Louis lode, between corners 2 and 3, 230 feet to the point of beginning, including an area of about 12,844.50 square feet, together with all the mineral contained therein; and if the said Charles Mayger, his heirs or assigns, shall make, execute and deliver the said deed of conveyance as by this agreement pro-
62 vided and intended, then this bond and agreement to be null and void; otherwise to be and remain in full force and effect.

Witness my hand and seal the day and year first above written.

CHARLES F. MAYGER. [SEAL.]

The name of Frank P. Sterling was inserted in this instrument as one of the obligees before the signing and delivery thereof.

CHARLES F. MAYGER. [SEAL.]

Witness:
J. K. TOOLE.

Duly acknowledged. Filed and recorded March 8, 1884, at 3 a. m.

(Title of Court, Title of Cause.)

Answer.

And now come the defendants herein and for answer to the complaint of plaintiffs:

I.

Admit that the said William Robinson, James Huggins and Frank P. Sterling, Warren De Camp and John W. Eddy were at the date mentioned in said complaint citizens of the United States and duly qualified mineral claimants, but on their information and belief deny that they were or are the predecessors in interest of said plaintiff, or that they were the owners or possessors of the piece, tract or parcel of land in said complaint described, or in the possession or entitled to the possession thereof, or any mineral therein then
63 or at any other time, or that the same was or is a part of the Nine Hour Lode claim, and aver that the same was and is a part of the St. Louis Lode mining claim, designated and known as such, and embraced and included in the United States patent obtained by the said defendant, Charles Mayger, for said St. Louis Lode mining claim, as hereinafter set forth.

Deny that defendant, Charles Mayger, wrongfully or otherwise extended or caused to be extended the easterly boundary line of said St. Louis mining claim over the said described premises or any part thereof, but admit that he caused a survey to be made of the same, and aver that the boundary lines of said St. Louis mining claim as originally located included and embraced the said *locus in quo* and every part thereof at and prior to the location of said Nine Hour Lode claim, and that the said Charles Mayger and his successors in

interest hath ever since been, and now are, in the possession of the same and entitled thereto, save and except a small strip thereof occupied by a portion of the ore-house of plaintiff by sufferance of defendants.

And on their information and belief deny that said Charles Mayger wrongfully made application in the United States land office to enter said premises, and aver that the same was and at all times had been a part and portion of the said St. Louis mining claim.

Admit that the adverse claim of Robinson and Huggins was interposed to said application, and that they instituted an action, as in said complaint mentioned, and that said agreement was entered into,
but deny that it was for the purpose of settling or agreeing
64 upon the boundary line between the said Nine Hour Lode mining claim and said St. Louis Lode mining claim, and aver that the same was executed to the said Robinson, Huggins and Sterling as a compromise on account of their adverse claim and suit aforesaid, and comprised a part of said St. Louis Lode claim owned and possessed by the said Charles Mayger, and to enable him to obtain a patent for the whole thereof according to said survey, and agreed to convey the same as in said bond set forth.

Defendants admit that by the terms of said bond the said Charles Mayger agreed, after obtaining a patent therefor, on demand of said Robinson, Huggins and Sterling, to make to them, their heirs or assigns, a good and sufficient deed for the premises in said complaint described, and on their information and belief aver that said plaintiff never has acquired or succeeded to the right, title or interest of said Robinson, Huggins and Sterling to said premises or any thereof, by conveyance or otherwise.

Deny that said Exhibit "A," as set forth, is a copy of said bond, in that it obligates the said Charles Mayger to execute a good and sufficient deed to Robinson alone, and avers the fact to be the said original bond obligated Charles Mayger to execute a deed on demand to said Robinson, Huggins and Sterling, their heirs or assigns, as expressly set forth and alleged in said complaint.

II.

Admit that said Charles Mayger obtained a patent for said St.
Louis Lode mining claim, but deny that it contained any por-
65 tion of said Nine Hour Lode mining claim, and aver that the said plaintiff and predecessors in interest had full knowledge and notice of the issuance of said patent mentioned, and were all aware and apprised thereof at or about the date of the issuance of the same.

Deny that at the time of the execution of said bond, or at any other time, the said plaintiff or its predecessors in interest were, or ever had been, in possession of said premises or any part thereof, except the small portion aforesaid, or that they or either of them used and enjoyed the same, or any part thereof, except the small portion aforesaid, or that they ever had, held or enjoyed any part thereof as a part of said Nine Hour Lode mining claim.

III.

Admit that the said plaintiff, by mesne conveyances, acquired the title to said Nine Hour Lode mining claims, but deny that the said conveyances or any conveyances to plaintiff embraced or included the premises in said complaint mentioned and described, or any part or portion thereof.

Admit that the said plaintiff demanded of defendants a deed to said premises, as set forth in said complaint, but deny that no demand therefor was ever theretofore made, and aver the facts to be as hereinafter stated.

IV.

Deny that the said defendants, or either of them, had any knowledge or notice that the said plaintiff was the successor in interest of said Robinson, Huggins and Sterling, or either of them, at the time of the making the deed by the said defendant Mayger to
66 his said codefendant, and on their information and belief deny that the said plaintiff is the successor in interest of said Robinson, Huggins and Sterling, or either of them, in said premises so embraced in said Mayger's survey and patent, or any part thereof.

Deny that defendants have combined or confederated together for the purpose of cheating, wronging or defrauding plaintiff out of its right or title to said premises or any part thereof, and aver, as heretofore, that the said plaintiff has not and never had any right or title to said premises, or any part thereof, as successor in interest to any one whomsoever.

Deny that the claim of defendants, or either of them, casts any cloud upon the title of plaintiff, or that it is necessary they or either of them should execute a deed to plaintiff for said premises, or any part thereof, to satisfy the requirements of equity, or for any other cause or reason, and aver that if the said conveyances to plaintiff for said Nine Hour Lode mining claim included said premises as alleged, no such transfer or conveyance is necessary for any purpose.

And these defendants, for further answer to the complaint of plaintiff, show unto this honorable court that the said adverse claim aforesaid was interposed for the purpose of harassing and delaying said Mayger from obtaining a patent to said St. Louis mining claim, and that the said bond was executed as a compromise to avoid the same; all of which was done contrary to equity and good conscience and for the sole purpose aforesaid.

67 That on the twenty-second day of July, 1887, the said Charles Mayger, grantor of his codefendant, obtained and procured a United States patent for the premises described in his complaint as a part and portion of his St. Louis mining claim in accordance with his possession and the survey had thereof, on account of which he acquired the legal title thereto, and had and held the possession thereof.

That *that* said defendant, The St. Louis Mining & Milling Company of Montana, ascertaining and hearing that the said convey-

ances to said plaintiff did not comprise the said premises described in plaintiff's complaint, and that it had and held no title thereto, and for the purpose of better securing the possessory title by it had and held, obtained and received the deed from said Charles Mayger mentioned and described in plaintiff's complaint.

And these defendants, for further answer to the complaint of the plaintiff, and in pursuance of section 105, Code of Civil Procedure, Compiled Statutes of Montana, allege generally that the cause of action set set forth in plaintiff's complaint is barred by the provisions of sections 29, 30, 31 and 32, subsection 41, and section 47 of said Code of Civil Procedure, and had been so barred at the time of the execution of said deed to said defendant company.

Wherefore, defendants pray this honorable court that if it shall appear the said plaintiff is not the owner of said premises by any of the conveyances mentioned in the said complaint, or the title by it so pleaded, that the same be decreed null and void, and that
68 the right, title and claim of defendant company be decreed superior to the claim of plaintiff in the premises in controversy; that such other and further relief may be had as in equity and good conscience they or either of them may seem entitled, and that they receive their costs and disbursements in this behalf expended.

W. W. DIXON,
McCONNELL, CLAYBERG & GUNN,
TOOLE & WALLACE,
Attorneys for Defendants.

Duly verified. Filed January 2, 1895.

(Title of Court, Title of Cause.)

Finding of Fact by the Court.

I.

That the plaintiff and the defendant, The St. Louis Mining & Milling Company of Montana, are and each of them were, at the date of the commencement of this action, corporations doing business in the State of Montana.

II.

That on the seventh day of March, A. D. 1884, William Robinson, James Huggins, F. P. Sterling, Warren De Camp and John W. Eddy were the owners of, in possession and entitled to the possession of all and singular the Nine Hour Lode claim, situate, lying and being in the Ottawa (unorganized) mining district in the county of Lewis & Clarke, State of Montana, and that the strip of ground called
69 the "compromise ground," which is the subject of dispute in this action, was, at that time, and thereafter continued to be, a part of said Nine Hour Lode mining claim.

III.

That prior to the date last aforesaid the said Charles F. Mayger had made application in the United States land office at Helena, Montana, for a patent to the said St. Louis Lode mining claim, and had included in his application the said ground which is the subject of dispute in this action, and that thereupon the said Robinson and Huggins had made and filed in the land office a protest and adverse claim to the ground in dispute, and an action had been instituted within the statutory time to determine the right to the possession of said premises in dispute, and as to who had the right to obtain patent therefor; which said action at said last aforesaid date was pending in the district court of the third judicial district of Montana, within and for the county of Lewis & Clarke; that on the seventh day of March, A. D. 1884, the said Robinson, Huggins and Sterling, and the defendant, Charles F. Mayger, entered into the bond or obligation attached to the complaint herein, marked "Exhibit A," and that said obligation or bond was made and given for the purpose of settling and determining the action aforesaid and the controversies involved therein, and for the purpose of determining and fixing the boundary line between the said Nine Hour Lode mining claim and the St. Louis Lode mining claim owned by the said Mayger, the boundaries of which claims were in conflict aforesaid.

70

IV.

That thereupon said suit was dismissed and the said adverse claim was withdrawn in said land office, the said Robinson, Huggins and Sterling performing on their part all of the terms and conditions of said contract to be by them performed.

V.

That at the date of the execution of said bond the said Robinson, Huggins and Sterling, Eddy and De Camp were in the actual possession of the said compromise strip, and they and their successors in interest have ever since remained in the possession thereof, claiming and holding the same as a part of the said Nine Hour Lode mining claim.

VI.

That at the date of the execution and delivery of said bond it was expressly agreed between the parties thereto that all of the ground lying to the east of the westerly line of the compromise strip should be a portion of the Nine Hour Lode mining claim.

VII.

That the plaintiff herein is the successor in interest of the said Robinson, Huggins and Sterling, the obligators named in said bond, and it is also the successor in interest of Warren De Camp and John W. Eddy, who were cotenants with said obligees in said premises at the date of the execution of said bond.

VIII.

That the conveyances introduced in evidence on the part
71 of the plaintiff embrace and were intended to include the said compromise ground, and conveyed to the respective grantees therein named all the interest, legal and equitable, which the said grantor or grantors had in said premises at the date of the execution thereof, and it was the intention of the parties to the deeds to convey as well their interest in said compromise strip as every other part and parcel of the said Nine Hour Lode mining claim.

IX.

That on or about the — day of July, A. D. 1893, the said plaintiff, as the assignee of the said Robinson, Huggins and Sterling, duly demanded a deed of the said compromise strip of ground of and from said defendant, but the said defendant refused to execute such deed, and that no demand for such deed had ever previously been made upon the said Charles F. Mayger by the said plaintiff or any of its predecessors in interest.

X.

That on or about the tenth day of June, A. D. 1893, the defendant, Charles F. Mayger, assumed to convey the said cempromise strip to his codefendant, The St. Louis Mining & Milling Company of Montana, but at the date of said conveyance, the said defendant, The St. Louis Mining & Milling Company of Montana, had full notice and knowledge of the equities of the plaintiff in and to said compromise strip and its possession thereof.

XI.

That the defendants wrongfully assert title to the ground in
72 controversy, and thereby cloud the title and estate of plaintiff therein, and that plaintiff has a right to have such cloud removed from its title to the premises in controversy.

XII.

That the court finds all of the issues raised by the pleadings in this case in favor of the plaintiff and against the defendants.

Conclusions of Law.

I.

The plaintiff is entitled to a conveyance from the said defendant of and for the premises particularly mentioned and described in the said bond, known as the "compromise ground."

II.

That the said defendants, and each of them, should be enjoined and perpetually restrained from asserting any right, title or interest of any kind or character in or to the said compromise ground, or

any part or portion thereof, and from in any manner interfering with the possession or enjoyment thereof by plaintiff.

Dated June 1, 1895.

HORACE R. BUCK, *Judge.*

(Title of Court, Title of Cause.)

Judgment.

This cause came regularly on to be tried on the tenth day of May, A. D. 1895, Charles J. Hughes, Jr., M. Kirkpatrick, and Cullen
73 & Toole appearing for the plaintiff, and Messrs. W. W. Dixon, Toole & Wallace and McConnell, Clayberg & Gunn appearing for the defendants. A jury having been expressly waived by the parties, the issues raised by the pleadings herein were tried to the court sitting without a jury, and after the introduction of testimony on the part of the plaintiff and on the part of said defendants, and the argument of counsel, and after due deliberation, the court having made and filed on the first day of June, 1895, its findings of fact and law in said case, and the issues having been found in favor of the plaintiff and against the defendants, and that the plaintiff is the owner of the equitable and entitled to the conveyance from the defendants of the legal title to the premises mentioned in the complaint and hereinafter described.

Now, therefore, on motion of counsel for plaintiff, it is ordered, adjudged, and decreed that the agreement set forth in the complaint herein, a copy whereof is attached to said complaint as an exhibit, be specifically performed, and that the defendant, The St. Louis Mining & Milling Company of Montana, within thirty days from and after the entry of this decree, execute and deliver to said plaintiff a good and sufficient conveyance in fee-simple absolute, free from all encumbrances, of and for the premises mentioned in the complaint and hereinafter described. The said conveyance shall be in form like the one hereunto annexed, and, upon the failure of said defendant within the time aforesaid so to make, execute, and deliver such conveyance, then the clerk of this court is hereby appointed a commissioner, who, in the name and for and on behalf of said de-
74 fendant, The St. Louis Mining & Milling Company of Montana, is hereby directed to execute a deed to said plaintiff for said premises, which, after reciting that it is so executed by said clerk as such commissioner for and on behalf of said defendant, shall be in form substantially like the one heretofore attached and approved, and, upon recording a duly certified copy of this decree, and of the said deed so executed by the said commissioner, in the office of the county recorder of the county of Lewis & Clarke and State of Montana, the same shall have the force and effect of a conveyance of the said title from said defendants to the said plaintiff; that the said defendants and all persons claiming under them or either of them be forever barred from all interest or claim to the said premises, or to any part or portion thereof, or to the possession of the same or any thereof.

The premises affected by this decree and so to be conveyed are more specifically bounded and described as follows, to wit:

Commencing at a point from which the center of discovery shaft of the Nine Hour lode bears south 39 degrees and 32 minutes east; said course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode claim, between corners two and three, two hundred and twenty-six (226) feet to a point on the boundary line of the St. Louis Lode claim, between corners one and two; thence south 20 degrees 28 minutes west along the line of said boundary, between corners one and two, 60.5 feet to corner
75 No. 2; thence 403 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the line of boundary of said St. Louis claim, between corners three and four, thirty feet distant to a point; thence north 50 degrees 28 minutes east along a line parallel to the boundary line of the St. Louis Lode claim, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.5 feet, together with all the mineral therein contained.

It is further ordered and adjudged that the plaintiff do have and recover from the said defendant its costs in this behalf sustained, taxed at the sum of — dollars.

And that the plaintiff have execution therefor.

June 1, 1895.

HORACE R. BUCK, *Judge.*

To which the defendant objected, for the reason that the same was not in rebuttal of anything proven or offered to be proven on the part of the defendant in this case, and for the further reason that the evidence was not material to any issue made by the pleadings in the case; that there being no ambiguity in either the bond or deed attached as an exhibit to defendant's answer herein, there was nothing for the court to construe.

It was stipulated by counsel for both parties that any objection to such papers based upon the ground that the same were not certified to or authenticated as required by law should be waived.

The papers were admitted in evidence, and marked "Plain-
76 tiff's Exhibit No. 2." The deed referred to in the judgment is in the same form as the copy of the deed in the answer of the defendant, which is a copy of the deed which was executed in pursuance of said judgment. Said deed is as follows:

This indenture, made and entered into this — day of ——, in the year of our Lord one thousand eight hundred and ninety-five, between the St. Louis Mining and Milling Company of Montana, an incorporation duly organized under the laws of the State of Montana, the party of the first part, and the Montana Mining Company, Limited, an incorporation duly organized under the laws of the Kingdom of Great Britain and Ireland, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America,

to it in hand paid, the receipt whereof is hereby confessed, has granted, bargained, sold, remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part and to its assigns forever, all and singular those certain premises situate, lying and being in Ottawa (unorganized) mining district, in the county of Lewis & Clarke and State of Montana more particularly bounded and described as follows, to wit:

Commencing at a point from which the center of the discovery shaft of the Nine Hour lode bears south 39 degrees, 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence
77 north 50 degrees, 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode claim, between corners two and three, two hundred and twenty-six feet to a point on the boundary line of the St. Louis Lode claim between corners one and two; thence south 20 degrees, 28 minutes west along the line of said boundary, between corners one and two, 60.5 feet to corner No. 2; thence 403 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees, 10 minutes west along the line of boundary of the said St. Louis Lode claim, between corners three and four, thirty feet distant to a point; thence north 50 degrees, 28 minutes east along a line parallel to the said boundary line of the St. Louis Lode claim, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.5 feet, together with all the mineral therein contained. Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz rock and earth therein, and all the rights, privileges and franchises thereto incident, appended or appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues, and profits therein, and also all and every right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the said premises,
78 with the appurtenances and privileges thereto incident unto the said party of the second part and its assigns forever.

In witness whereof, the said party of the first part, by resolution of its board of trustees, has caused its president and secretary to subscribe said presents for said corporation, and to affix hereto its corporate seal the day and year first above written.

——— ———.
——— ———.

Said papers are admitted in evidence for the court alone and to enable it to construe the deed.

The plaintiff then offered to prove that from the vein known as the Drum Lummon vein and between the plane known in this case as the 108 plane, and the plane referred to as the 133-foot plane,

which is the plane 25 feet south of the 108-foot plane and parallel thereto, and from a portion of the Drum Lummon vein between the planes mentioned which has a portion of its apex within the plane and through which space the foot wall passes entirely, we offer to prove that from that portion of the vein between the planes aforesaid the defendant company has extracted ore of the value of not less than one hundred and fifty thousand dollars.

To which offer the defendant objected—first, on the ground that the same is not rebuttal evidence; and, second, on the ground that the same is at any stage of the proceedings immaterial and irrelevant, for the reason set forth in the objection which was made when the offer was first made in the case in chief. The objection
79 was by the court sustained. To which ruling of the court the plaintiff then and there duly excepted.

Thereupon the plaintiff rested.

The foregoing is substantially all the evidence given or offered to be given in said cause.

Counsel then addressed the jury, and after being instructed by the court as appears in the instructions of record, the jury retired, and thereafter, on Saturday, the 12th day of August, 1899, returned their verdict in favor of the plaintiff, which said verdict is a part of the record in this case, and is hereby referred to and made a part hereof.

And thereafter, on the 21st day of August, 1899, the plaintiff served upon the attorney for the defendant, and filed with the clerk of the above-entitled court, this, its bill of exceptions, and prays that the same may be settled, signed, sealed, and made a part of the record in this case.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

This cause having been brought on regularly before the
80 court on this twenty-eighth day of August, 1899, one of the days of the April term of said court, at which said term said cause was tried before a jury, upon the application of the plaintiff for the settling and certifying of his proposed bill of exceptions lately filed herein and served upon the attorneys for the defendant herein within the time allowed by the rules of this court, and the parties thereto having agreed that the said proposed bill of exceptions should be settled and allowed, and the defendant not desiring to propose any amendments thereto, and the court having examined said proposed bill of exceptions, and having found the same to be correct, and that the same contains substantially all of the evidence given or offered to be given in said cause:

Now, therefore, on motion of Messrs. E. W. Toole, Arthur Brown, and Thomas C. Bach, the attorneys for the plaintiff, it is ordered that said proposed bill of exceptions heretofore filed by the said plaintiff in this cause be, and it hereby is, settled as the true bill of exceptions in this case, and that the same as so settled be now and here certified accordingly by the undersigned, the judge of this court, who presided at the trial of this cause, and that said bill of exceptions, when so certified, be filed by the clerk.

Dated the 28th day of August, 1899, one of the days of the April term, 1899, of said court.

HIRAM KNOWLES, *Judge.*

(Endorsed:) (Title of court and cause.) Bill of exceptions. Filed Aug. 21, 1899. Geo. W. Sproule, clerk, and also filed Aug. 28, 1899. Geo. W. Sproule, clerk.

81 And thereafter, to wit, on the 29th day of January, 1900, the plaintiff filed its assignment of errors herein as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Assignment of Errors.

Now comes the plaintiff, St. Louis Mining and Milling Company of Montana, by Arthur Brown, E. W. Toole, and Thos. C. Bach, its attorneys, and says that the record and proceedings in the above-entitled cause show that there is manifest error in this:

I.

The court erred in refusing plaintiff's offer to prove by the witness Keerl that between the plane known as the 108-foot plane and the plane known as the 133-foot plane and easterly of what is
82 known as the westerly side line of the thirty-foot strip and from the Drum Lummon lode which has a part of apex within the St. Louis ground proper, exclusive of the thirty-foot strip, and between the planes aforesaid, the defendant had, on the dip of said vein, extracted ore from said vein to the amount of one hundred and fifty thousand dollars.

II.

The court erred in sustaining the objection of the defendant to the following question asked of the witness Parks:

"Q. Tell us about block 3. How many cubic feet in that?"

Block 3 being a block of ore removed by the defendant from the vein referred to in assignment I, between the planes therein referred to and from that portion of the dip thereof which is east of the easterly side line of the compromise strip.

III.

The court erred in granting the motion of the defendant to have the testimony of the witness Jenney, with reference to the foot wall, stricken out. Said testimony was, in substance, as follows:

"The foot wall passes through the 108-foot plane, going southerly; it is not determined accurately where the foot wall passes out of the St. Louis ground, and it is still within the St. Louis ground west of the west side line of the compromise ground at a point south of the 133-foot plane."

IV.

And the said court erred in sustaining the objection to the
83 following question put to the witness Keerl: "I will ask you now, Mr. Keerl, if you made any measurements of the ore extracted from this vein between the 108-foot plane and the 133-foot plane and east of the west line of the thirty-foot strip?"

V.

The court erred in striking out the testimony of the witness Jenney to the effect, and the substance of which was, that the Drum Lummon vein passed beyond the 108-foot plane northerly within the St. Louis claim and passed out of the north end line of that claim."

VI.

The court erred in sustaining the objection of the defendant to the plaintiff's offer to introduce in evidence in the opening of its case the judgment-roll, being "Plaintiff's Exhibit No. 2," said judgment-roll being in an action in which the plaintiff herein was the defendant and the defendant herein was plaintiff, and which said action was brought to compel the plaintiff herein to execute the deed conveying to the defendant herein the so-called thirty-foot strip or compromise ground. The findings of the court are, in substance, to the effect that the predecessors in interest of the defendant herein, on the 7th day of March, 1884, were in posssession of the so-called Nine Hour Lode claim, and that the strip of ground called the compromise ground was at that time, and thereafter continued to be, a part of the said Nine Hour Lode mining claim; that prior to that date the predecessor in interest of the plaintiff herein had
84 made application in the United States land office at Helena, Montana, for a patent to the St. Louis Lode mining claim, and had included in its application the said thirty-foot strip or compromise ground; and that thereupon the predecessors in interest of the defendant herein filed a protest and commenced an action to determine the right to the possession of said thirty-foot strip or compromise ground; that while said action was pending the predecessor in interest of the defendant herein entered into an obligation in writing to convey said premises to the predecessor in interest of the defendant herein, and that said obligation or agreement to convey said premises was made and given for the purpose of settling and determining the action aforesaid, and for the purpose

of determining and fixing the boundary line between the Nine Hour Lode claim and the St. Louis mining claim, the boundaries of which were in conflict; that the said suit was then dismissed and the adverse claim withdrawn, and that the predecessors in interest of the defendant herein at the time of the execution of the said obligation or agreement were in the actual possession of the said compromise strip, and they and their successor in interest have ever since remained in possession thereof, claiming and holding the same as a part of the said Nine Hour Lode mining claim; that at the date of the execution of the said obligation or agreement it was agreed between the parties thereto that the compromise ground should be a portion of the Nine Hour Lode mining claim. The judgment of the court directed the plaintiff herein to execute the deed mentioned in the complaint in this action conveying the said compromise ground or thirty-foot strip to the defendant herein, and said deed was accordingly executed.

85 Wherefore, the said St. Louis Mining and Milling Company of Montana, plaintiff in error, prays that the judgment of the circuit court of the United States for the District of Montana be reversed, and that the said circuit court be directed to enter an order setting aside the verdict and dismissing the said cause of action.

ARTHUR BROWN,
E. W. TOOLE, AND
THOS. C. BACH,
Attorneys for Plaintiff in Error.

(Endorsed:) (Title of court and cause.) Assignment of errors. Filed January 29, 1900. Geo. W. Sproule, clerk.

86 And thereafter, to wit, on the 29th day of January, 1900, the plaintiff herein filed its petition for a writ of error herein, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Petition for Writ of Error and Order Allowing Same.

The St. Louis Mining and Milling Company of Montana, the plaintiff in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and judgment entered on the sixteenth day of August, A. D. 1899, comes now by Messrs. E. W. Toole, Thos. C. Bach, and Arthur Brown, its attorneys, and petitions the court for an order allowing said plaintiff to prosecute a writ of error to the honorable, the United States circuit court of appeals for the ninth circuit, under and according to the laws of the United States in that behalf made

and provided, and also that an order be made fixing the
87 amount of security which it shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States circuit court of appeals for the ninth circuit, and your petitioner will ever pray.

January 29th, 1900.

ARTHUR BROWN,
E. W. TOOLE, AND
THOMAS C. BACH,
Attorneys for Plaintiff.

Upon motion of Messrs. E. W. Toole, Thos. C. Bach, and Arthur Brown, attorneys for the plaintiff, and upon filing a petition for writ of error and assignment of errors—

It is ordered that writ of error be and hereby is allowed to have reviewed in the United States circuit court of appeals for the ninth circuit, the judgment heretofore entered herein, and that the amount of the bond on said writ of error be and hereby is fixed at three hundred dollars.

January 29, 1900.

HIRAM KNOWLES, *Judge.*

(Endorsed:) (Title of court and cause.) Petition for writ of error and order allowing same. Filed and entered Jan. 29, 1900. Geo. W. Sproule, clerk.

88 And thereafter, to wit, on the 29th day of January, 1900, plaintiff filed its bond on writ of error herein as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Bond on Writ of Error.

Know all men by these presents, that we, St. Louis Mining and Milling Company of Montana, as principal, and R. C. Wallace and Henry Klein, of Helena, Lewis and Clarke county, Montana, as sureties, are held and firmly bound unto The Montana Mining Company, Limited, defendant above named, in the sum of three hundred dollars to be paid to the said Montana Mining Company, Limited, its successors or assigns, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, firmly by these presents.

Sealed with our seals and dated the twenty-ninth day of January, 1900.

89 Whereas, the above-named plaintiff, The St. Louis Mining and Milling Company of Montana, has sued out a writ of error to the United States circuit court of appeals for the ninth circuit, to reverse the judgment entered in the above-entitled cause on the sixteenth day of August, 1899, by the circuit court of the United States for the district of Montana:

Now, therefore, the condition of this obligation is such that if the above-named St. Louis Mining and Milling Company of Montana shall prosecute said writ of error to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

ST. LOUIS M. & M. CO.,
By WM. MAYGER, *Mgr.*
R. C. WALLACE.
HENRY KLEIN.

STATE OF MONTANA, } *ss:*
County of Lewis and Clarke, }

R. C. Wallace and Henry Klein, the sureties on the foregoing bond, being duly sworn, each for himself, says that he is a resident of the county of Louis and Clarke, State of Montana, and a freeholder therein; that he is worth the sum of six hundred dollars above all his debts and liabilities, exclusive of property exempt from execution.

R. C. WALLACE.
HENRY KLEIN.

90 Subscribed and sworn to before me this 29th day of January, 1900.

[SEAL.] JOSEPH W. CHIVERS,
Notary Public in and for Lewis and Clarke County, Montana.

Within bond approved January 29, 1900.

HIRAM KNOWLES *Judge.*

(Endorsed:) (Title of court and cause.) Bond. Filed and entered Jan. 29, 1900. Geo. W. Sproule, clerk.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the ninth circuit, district of Montana, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between St. Louis Mining and Milling Company of Montana, plaintiff in error, and Montana Mining Company, Limited, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error as by its complaint appears, and it being fit that the error, if any there hath been, should be duly

corrected, and full and speedy justice done to the parties afore-
91 said in this behalf, you are hereby command, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States circuit court of appeals for the ninth circuit, together with this writ, so that you have the same at San Francisco in the State of California within thirty days from the date this writ bears date, in the said United States circuit court of appeals for the ninth circuit, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States circuit court of appeals for the ninth circuit may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of the circuit court of the United States for the district of Montana, this 30th day of January, A. D. 1900.

[SEAL.] GEO. W. SPROULE, *Clerk.*

The above writ of error is hereby allowed.

HIRAM KNOWLES, *Judge.*

Service of the within writ of error and copy thereof admitted this 31st day of January, 1900, at Helena, Montana.

CULLEN, DAY & CULLEN,
Attorneys for Defendant in Error.

(Endorsed:) Filed and entered Jan. 31, 1900. Geo. W. Sproule, clerk.

92 *Return to Writ of Error.*

The answer of the judges of the circuit court of the United States for the district of Montana.

The record and all proceedings of the plaintiff in error, wherein mention is within made, with all things touching the same, I hereby certify, under the seal of said court, to the United States circuit court of appeals for the ninth circuit within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the court:

[SEAL.] GEO. W. SPROULE, *Clerk.*

Citation.

UNITED STATES OF AMERICA, *ss:*

To Montana Mining Company, Limited, Greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals for the ninth circuit, to be held at the city of San Francisco, in the State of California, thirty days from the date hereof, pursuant to a writ of error, wherein St. Louis

Mining and Milling Company of Montana is plaintiff in error and you, said Montana Mining Company, Limited, is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

93 Witness, the Honorable Hiram Knowles, United States district judge for the district of Montana, this 30th day of January, A. D. 1900.

HIRAM KNOWLES,
United States District Judge for the District of Montana.

Service of the above citation and copy thereof admitted this 31st day of January, 1900, at Helena, Montana.

CULLEN, DAY & CULLEN,
Attorneys for Defendant in Error.

(Endorsed:) Filed and entered Jan. 31, 1900. Geo. W. Sproule, clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Stipulation as to Maps.

It is hereby stipulated by and between the parties to the above-entitled action that the maps heretofore introduced in evidence upon the trial of the said action in the said court, and marked

94 Plaintiff's Exhibit No. 1 and No. 1*a*, and Defendant's Exhibit No. 3, may be transmitted by the clerk of the said circuit court to the clerk of the circuit court of appeals for the ninth circuit, and by the said clerk of said circuit court of appeals filed in the causes heretofore or about to be taken to the said circuit court of appeals on writs of error by the said plaintiff and defendant in the above-entitled action, and when so filed the said original maps may be used on the argument of the said writs of error with the same force and effect as if the said maps had been inserted in the record transmitted by the clerk in the said several writs of error.

Dated January 31, 1900.

E. W. TOOLE AND
THOS. C. BACH,
Attorneys for Plaintiff.
CULLEN, DAY & CULLEN,
Attorneys for Defendant.

(Endorsed:) (Title of court and cause.) Stipulation as to maps. Filed and entered Feb. 1, 1900. Geo. W. Sproule, clerk.

Clerk's Certificate to Transcript.

UNITED STATES OF AMERICA, *District of Montana,* } ss:

I, George W. Sproule, clerk of the United States circuit court for the district of Montana, do hereby certify and return to the
95 honorable the United States circuit court of appeals for the ninth circuit, that the foregoing volume, consisting of (92) ninety-two pages, numbered consecutively from one to (92) ninety-two, is a true and correct transcript of the pleadings, process, records, orders, judgment and all proceedings had in said cause and of the whole thereof, as appear from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original writ of error and citation issued in said cause with admission of service thereof.

I further certify that the cost of the transcript of record amounts to the sum of thirty-eight dollars and ninety cents, and has been paid by the plaintiff in error.

In witness whereof, I have hereunto set my hand and affixed the seal of said United States circuit court at Helena, Montana, this 21st day of February, A. D. 1900.

[SEAL.] GEO. W. SPROULE, *Clerk.*

(Endorsed:) No. 594. In the United States circuit court of appeals for the ninth circuit. The St. Louis Mining and Milling Company of Montana, plaintiff in error, *vs.* The Montana Mining Company, Limited, defendant in error. Transcript of record. Error to the circuit court of the United States for the district of Montana. Filed February 26, 1900. F. D. Monckton, clerk.

96 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff in Error,
vs.
THE MONTANA MINING COMPANY, LIMITED, Defendant in Error. } No. 594.

In error to the circuit court of the United States for the district of Montana.

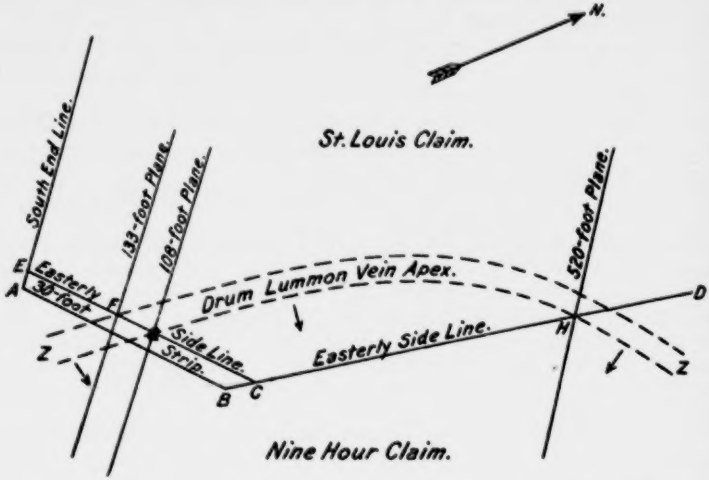
Opinion.

MONDAY, *October* 8, 1900.

This is an action originally brought by The St. Louis Mining & Milling Company, a Montana corporation, plaintiff in error, in the circuit court of the United States for the district of Montana, to recover damages for trespass and the value of certain ores alleged

to have been wrongfully appropriated and taken by The Montana Mining Company, Limited, a corporation of Great Britain, defendant in error. After trial by a court and jury, resulting — a verdict for the plaintiff in error in the sum of $23,209, plaintiff in error now brings the suit to this court upon certain assignments of error which it alleges deprived it of a larger verdict.

There is practically no contention between the parties as to the facts. The plaintiff in error is the owner of the St. Louis
97 mining claim, situated near Marysville, in the State of Montana, and the defendant in error owns the Nine Hour mining claim, adjoining the St. Louis claim on its easterly side. The St. Louis claim is the older location. It contains two veins, known in the record as the discovery vein and the Drum Lummon vein. The accompanying map gives the general location of the two claims and all details of description which need be considered in this opinion.



By way of explanation of the map, it may be stated that the line E C D is the dividing line between the two claims. The line marked "133-foot plane" is a projected line plane parallel to the southerly line of the St. Louis claim and 133 feet southerly from the point C on the line C E; the line marked "108-foot plane" is a similar plane 108 feet from the said point C; and the line marked "520-foot plane" is a similar plane 520 feet southerly from the northeasterly corner of the St. Louis claim on the line D C. The strip of land
98 included within A B C E is a strip 30 feet wide, called in the record the "30-foot" or "compromise" strip. The arrows show the direction of the dip of the vein to be eastwardly and underneath the Nine Hour claim. The discovery vein is not shown upon the map, but it is established by the evidence to have a northeasterly and southwesterly trend, following generally the length of the claim as located. As to the Drum Lummon vein, there is a dis-

crepancy between the complaint and the evidence. The complaint alleges that it enters the easterly line of the St. Louis claim at the point H, or the 520-foot plane, and departs from the claim at the 133-foot plane at F. The evidence shows a different state of facts, to the extent that it appears therefrom that more of the Drum Lummon vein is within the St. Louis claim to the north, and that the foot wall does not pass out of the St. Louis claim until a considerable distance southerly of the 133-foot plane, if it does at all. But the case will be considered as if the vein were located according to the allegations of the complaint (and the map so shows it), as the assignments of error herein are based upon such an assumed state of facts.

Upon the trial of the cause, the plaintiff in error claimed the right to pursue the Drum Lummon vein extralaterally so long as any part of the apex of the vein was within the boundaries of the St. Louis claim. The defendant in error denied this right in toto, basing such denial upon the following state of facts: When the predecessors in interest of the plaintiff in error applied for a patent to the St. Louis ground, they included the so-called 30-foot strip shown upon the map in the claim. The owners of the Nine Hour claim opposed the issuance of the patent so far as this strip was concerned, asserting that it was a part of the Nine Hour claim. A compromise was entered into by which the owners of the St. Louis claim agreed to convey to the
99 owners of the Nine Hour claim, upon their receiving a patent, the said 30-foot strip, and this was afterwards done, after suit had been brought for specific performance of the contract. The defendant in error claimed that by this deed, owing to its language and the nature of the transactions leading up to it, the plaintiff in error was foreclosed of the right to pursue the Drum Lummon vein under the said 30-foot strip. The trial court permitted evidence of the value of ores alleged to be appropriated by the defendant in error from the vein as it passed under the Nine Hour claim and the 30-foot strip, between the 520-foot plane and the 108-foot plane, to go to the jury, and charged the jury that the effect of the proceedings had was to make the 30-foot strip a part of the original Nine Hour claim, and that the defendant in error had the same rights therein, and no further rights, than as if it had been originally patented as a part of the Nine Hour claim; and further charged the jury that the line E C was a side line common to the two claims, and that so long as the Drum Lummon vein apexed entirely within the St. Louis claim, the plaintiff in error could follow it in its dip under the Nine Hour claim, including the 30-foot strip. Upon this the jury rendered a verdict in favor of the plaintiff in error for the sum of $23,209. A writ of error was sued out by the defendant in error to this court, and this court, in Montana Mining Co. *v.* St. Louis Mining & Milling Co., 102 Fed., 430, sustained the lower court upon these propositions as submitted to the jury, holding the line E C D, as shown upon the map, to be a boundary line between the two claims and a side line of each claim, and granting the plaintiff in error here the right of lateral pursuit under both the 30-foot strip and the remainder of the Nine Hour claim. Hence in this opinion

the 30-foot strip will not be treated separately, but will be re-
100 garded as part and parcel of the Nine Hour claim.

Upon the trial, however, the plaintiff in error further offered evidence to show the value of ores alleged to have been appropriated by the defendant in error, contained in the said Drum Lummon vein between the 108-foot plane and the 133-foot plane. This offer was made, first, as to the portion of the vein between said planes underneath the 30-foot strip, and, secondly, as to the portion thereof under the Nine Hour claim to the easterly of the 30-foot strip; but, for the purpose of applying the principles of law which will control here, these two offers may be considered as one, in accordance with the decision in 102 Fed. 430, *supra*. The court sustained objections to the evidence offered, and upon assignments of error based upon these rulings, the case is now before this court.

Arthur Brown, H. P. Henderson, E. W. Toole, and T. C. Bach, attorneys for plaintiff in error.

W. E. Cullen, E. C. Day, and W. E. Cullen, Jr., attorneys for defendant in error.

Before Gilbert, Ross, and Morrow, circuit judges.

MORROW, circuit judge, delivered the opinion of the court:

The assignments of error raise but one question which need now be passed upon, all others having been adjudicated upon the writ of error of the defendant in error herein, in the case of Montana M. Co. *v.* St. Louis M. & M. Co., 102 Fed. 430. The question for present consideration is: When a secondary or accidental vein crosses
101 a common side line between two mining locations at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim and partly within the other, to whom does such portion of the vein belong? This question does not appear to have ever been directly passed upon by the courts. But, while it is not entirely free from difficulty, the application of well-established principles of law thereto should conclusively determine the question.

Two important elements enter into the consideration of mining rights: first, the surface boundaries, defining the rights acquired by reason of a vein or veins apexing within such boundaries; and second, the extent of underlying mineral deposits attaching to such surface rights.

The defendant in error contends that it is entitled to the vein in its entirety in depth to the easterly of a vertical plane drawn through the line E C, upon the theory that the said line is an end line so far as the Drum Lummon vein is concerned, or, if it be determined that the line E C is a side line, that it is entitled to the entire vein in depth to the southerly of the 108-foot plane.

As to the first contention, it is a well-settled proposition that a mining claim can have but two end lines; and that, end lines having been once established, they become the end lines for all veins found within the surface boundaries. Iron S. M. Co. *v.* Elgin M. Co., 118 U. S. 196, 207; Walrath *v.* Champion Mining Co., 171 U. S.

293, 307. This court has already determined that the line E C D is a side line common to the two claims (102 Fed. 430), and therefore it cannot be considered an end line for the Drum Lummon vein.

The second contention of the defendant in error involves the construction of section 2322 of the Revised Statutes. That section provides: "The locator of a mining location * * *
102 shall have the exclusive right to possess and enjoy * * * all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically." The defendant in error maintains that the words "top or apex" cannot be construed to mean "top or apex or any part thereof," and that under the strict construction necessary, extralateral rights would not follow when the whole of the apex was not within the surface lines. If this be the correct view of the language of the statute, manifestly neither party herein would be entitled to pursue the vein in depth between the 108-foot plane and the 133-foot plane, since the apex of the vein between those points, while crossing the side line, is not wholly within either claim.

For the purposes of illustration, suppose the vein were regular and vertical for the 25 feet between the two planes mentioned, crossing the side line at the same angle. The boundary rights between the parties could not then be determined by the application of a vertical plane extending to the center of the earth along the side line and 25 feet in horizontal width, since that would be constructing an end line to that extent, and there is no authority in the statute or in the decisions for any such action. It might be said that the vein could equitable be cut by a plane parallel with and midway between the 108 and 133 foot planes, thus bisecting the portion of the vein in controversy, and giving half of the disputed ground to each claim. But neither is there any authority for such a determination by the court. It would seem, therefore, that by some rule the entire 25 feet should be construed to apex in one of the locations. And as, where the rights of two mining locators are apparently equal with respect to mining ground, the element of priority of location is controlling, preference being generally given to the
103 senior locator (Argentine M. Co. *v.* Terrible M. Co., 122 U. S. 478, 484),—the entire vein would be given to plaintiff in error. If this be the true doctrine when a vein is vertical, why should there be any change in its application when the vein dips? The right of lateral pursuit is a right conferred by statute. It does not depend upon circumstances, and is as absolute as the ownership of a vein apexing within the surface lines, save that it ceases when and at the point that it interferes with the statutory rights of another. In other words, the determination of a rule and its application to the case before the court should be the same whether the vein dips toward the junior location, or toward the senior location, or does not dip at all. The defendant in error, in support of its contention that the right of extralateral pursuit only remains so long as the entire vein is within the claim, cites the case of Fitzgerald *v.* Clark, 17 Montana, 100, the decision in which was affirmed by the

Supreme Court of the United States (171 U. S. 92). But the question here involved was not there considered. It appears that in that case no attention was given to the width of the vein, its crossing of the side line being regarded merely as a point. No mention whatever was made of the width of the vein or of its apex. Reference is also made by the defendant in error to adjudications upon the class of veins called "split veins." But the case under review does not involve a split vein, and a different principle must apply.

If, then, in construction of law the vein for the 25 feet in controversy must be either upon the one location or the other, and if the senior locator has priority of title, it would follow that the right of lateral pursuit would remain with the senior locator within a plane parallel to the end line of the senior claim and up to
104 the point of departure of the apex, or in this case, the foot wall.

It may be said that the application of this rule will sometimes work hardship. It is true that hypothetical cases may be assumed which, as individual types, may present difficulties in equitable adjudication. But the application of principles sanctioned by judicial authority furnishes the most effective solution of such problems, and will undoubtedly reduce the seeming inequities to a minimum.

Upon the question first propounded in this opinion, therefore, the only deduction which can be made from the foregoing views is, that inasmuch as neither statute nor authority permits a division of the crossing portion of the vein, and the weight of authority favors the senior locator, the entire vein must be considered as apexing upon the senior location until it has wholly passed beyond its side line.

It follows, that the court below erred in its refusal to admit the evidence offered as to the value of ores taken from the Drum Lummon vein on its dip between the planes designated as the 108-foot and 133-foot planes, and the cause is therefore remanded for new trial as to damages alleged and recovery sought for conversion of ore between the planes indicated.

(Endorsed:) Opinion. Filed Oct. 8, 1900. F. D. Monckton, clerk.

105 Ross, circuit judge, dissenting:

I dissent. The case of The Montana Mining Co., Limited, *vs.* The St. Louis Mining & Milling Company, 102 Fed. Rep., 430, referred to in the foregoing opinion, affirmed the existence of extralateral rights in respect to a vein that enters and departs from a side line only of a mining claim, and the judgment in the present case affirms such right on the authority of the decision in the former case. Yet in neither is the point at all discussed by the court, and in the opinion in the former case there is not a word said from which it can be seen that any such point was presented for decision. (102 Fed. 430.) The importance of the question, not only to the correct determination of the present case, but in respect to other mining claims, is too manifest to require comment. In the former case a petition for rehearing is now pending, and I think it should

be granted and that case, together with the present one, set down for reargument, to the end that the question as to whether any extralateral rights exist in respect to any vein that enters and departs from a side line only, be discussed by counsel and fully considered by the court before final determination.

(Endorsed:) No. 594. Dissenting opinion. Filed Oct. 8, 1900. F. D. Monckton, clerk.

106 United States Circuit Court of Appeals for the Ninth Circuit.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff in Error,
vs.
THE MONTANA MINING COMPANY, LIMITED, Defendant in Error,
} No. 594.

In error to the circuit court of the United States for the district of Montana.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Montana, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby, reversed, with costs, and the cause is remanded to said circuit court for a new trial as to damages alleged and recovery sought for the conversion and value of certain ores taken from the Drum Lummon vein on its dip between the planes designated as the 108-foot and 133-foot planes.

(Endorsed:) Judgment. Filed and entered Oct. 8, 1900. F. D. Monckton, clerk.

107 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Plaintiff in Error,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant in Error.
} No. 594.

To the honorable the judges of the United States circuit court of appeals, ninth judicial circuit:

Comes now the above-named defendant in error, The Montana Mining Company, Limited, and complains that in the record and proceedings had in said cause and in the opinion and judgment of this honorable court, rendered on the 8th day of October, A. D. 1900, upon the cross-writ of error sued out by the plaintiff in error in case No. 567 on the docket of this court, manifest error hath happened to the great damage of your petitioner, in this, to wit:

(*a.*) In holding in the opinion and judgment rendered herein that in a case where the apex of the lead crosses a common side line between two claims at an acute angle, that the locator having the oldest location is entitled to follow the said vein on its dip so long as any part of the apex of such lead is within the surface boundaries of his said mining claim.

(*b.*) The honorable, the circuit court of appeals likewise erred in holding in its said opinion and judgment aforesaid that the
108 said plaintiff in error was not estopped by its contract by the judgment rendered thereon, appearing in the record herein, and by the deed from the said plaintiff in error to your petitioner, executed in pursuance of such contract and judgment, from claiming any mineral found within said thirty-foot strip or compromise ground, and was not enjoined from interfering with your petitioner's possession of said compromise ground and the mineral therein contained.

And your petitioner further shows that in this case and in the case wherein this was brought to this court by a cross-writ of error, the jurisdiction of the circuit court of the ninth circuit, district of Montana, was not dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States, but that in and by the complaint and pleadings on the part of plaintiff in error here and plaintiff in the court below, there were presented questions arising under the Constitution and laws of the United States in this, to wit: Whether the owner of a mining claim under the laws of the United States might follow a vein beyond the side lines of his claim, the apex of which said vein entered and departed through the same side line; also the further question as to whether he might pursue said vein beyond his own side line when the same departed therefrom and entered another claim adjoining and at an acute angle, beyond the point where the whole of the apex of said vein was within the lines of his own claim; and the further question was presented by the pleadings of the said plaintiff as to what faith or credit should be given to the judgment rendered between the parties in this action in the specific-performance case, the judgment-roll whereof appears in the record herein; that as said case was originally brought in
109 the said circuit court of the United States for the ninth circuit, district of Montana, the jurisdiction of said court depended entirely upon the said Federal questions and not upon the diversity of citizenship of the parties thereto.

Wherefore, your petitioner prays for an order allowing it to prosecute a writ of error from the honorable, the Supreme Court of the United States to this court, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which your petitioner shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the honorable the Supreme Court of the United States.

And your petitioner as in duty bound will ever pray.

CHAS. J. HUGHES, JR.,
W. E. CULLEN, AND
E. C. DAY,
Attorneys for Petitioner.

Let the writ of error prayed for in the foregoing petition issue, and further proceedings in this cause in this court be stayed upon the petitioner executing a good and sufficient bond in the sum of twenty-five thousand dollars, conditioned as required by statute.

WM. B. GILBERT,
Circuit Judge.

(Endorsed:) Petition for writ of error and order allowing same, &c. Filed October 24, 1900, F. D. Monckton, clerk, U. S. circuit court of appeals for the ninth circuit.

110 Know all men by these presents, that we, The Montana Mining Company, Limited, as principal, and The United States Fidelity and Guaranty Company, a corporation of Baltimore, Md., as surety, are held and firmly bound unto The St. Louis Mining & Milling Company of Montana, in the full and just sum of twenty-five thousand dollars, to be paid to the said The St. Louis Mining & Milling Company of Montana, its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ouselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of October, in the year of our Lord, one thousand nine hundred.

Whereas, lately at a circuit court of appeals of the United States for the ninth circuit, in a suit depending in said court, between The St. Louis Mining & Milling Company of Montana, plaintiff in error, and The Montana Mining Company, Limited, defendant in error, a judgment was rendered against the said The Montana Mining Company, Limited, and the said The Montana Mining Company, Limited, having obtained from said court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said The St. Louis Mining and Milling Company of Montana, citing and admonishing it to be and appear at a United States Supreme Court, to be holden at the city of Washington, in the District of Columbia, on the 20th day of December next:

Now, the condition of the above obligation is such, that if the said The Montana Mining Company, Limited, shall prosecute its
111 writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE MONTANA MINING CO., L'D, [SEAL.]
By ALEX. BURRELL, *Attorney-in-fact.* [SEAL.]
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By its attorney-in-fact,
JOHN H. ROBERTSON. [SEAL.]

Acknowledged before me the day and year first above written, by Alex. Burrell.

[SEAL.] J. S. MANLEY,
U. S. Commissioner, Northern District of California.

(Cancelled internal-revenue stamps.)

(Endorsed:) Bond on writ of error. Form of bond and sufficiency of securities approved. Wm. B. Gilbert, circuit judge. Filed Oct'r 24, 1900, F. D. Monckton, clerk.

112 United States Circuit Court of Appeals for the Ninth Circuit.

THE ST. LOUIS MINING AND MILLING COMPANY OF Montana, Plaintiff in Error,
vs.
THE MONTANA MINING COMPANY, LIMITED. } No. 594.

Certificate of Clerk C. C. A. to Transcript.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and eleven (111) pages, numbered from one (1) to one hundred and eleven (111), inclusive, to be a true copy of the record, and of all proceedings in the above-entitled case, as the same appear of record in my office, and that the same, together, constitute the return to the annexed writ of error.

Attest my hand and the seal of said circuit court of appeals, at San Francisco, California, this 15th day of November, A. D. 1900.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

{ Ten-cent United States internal-revenue stamp, canceled 11, 15, 1900. F. D. M., cl'k. }

113 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you, or some of you, between The St. Louis Mining and Milling Company of Montana, plaintiff in error, and The Montana Mining Company, Limited, defendant in error, No. 594, a manifest error hath happened, to the great damage of the said Montana Mining Company, Limited, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Su-

preme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the 20th day of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of October, in the year of our Lord one thousand, nine hundred.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Allowed by
WM. B. GILBERT,
Circuit Judge.

114 [Endorsed:] Docketed. No. 594. United States circuit court of appeals for the ninth circuit. St. Louis Mining & Milling Co. of Montana, plaintiff in error, *vs.* Montana Mining Co. L'd, defendant in error. Original writ of error. Filed November 2d, 1900. F. D. Monckton, clerk U. S. circuit court of appeals, for the ninth circuit.

Due personal service of the within writ of error is hereby admitted and receipt of copy acknowledged this 29th day of October, A. D. 1900. Dated at Helena, Montana, on said day.

THOMAS C. BACH,
EDWIN W. TOOLE,
Attorneys for St. Louis Mining & Milling Co. of Montana, Def't in Error

Return to Writ of Error.

The answer of the judges of the United States circuit court of appeals for the ninth circuit.

As within we are commanded, in a certain schedule to this writ annexed we certify under the seal of our said circuit court of appeals the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within-named defendant in error.

By the court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

115 UNITED STATES OF AMERICA, *ss:*

The President of the United States to The St. Louis Mining and Milling Company of Montana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, in the District of Columbia, on the 20th day of December 1900, pursuant to a writ of error duly issued out of the clerk's office of the United States circuit court of appeals, for the ninth circuit, wherein The Montana Mining Company, Limited, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William B. Gilbert U. S. circuit judge and judge of the United States circuit court of appeals for the ninth circuit this 24th day of October, A. D. 1900.

WM. B. GILBERT,
Circuit Judge.

[Endorsed:] Docketed. No. 594. U. S. circuit court of appeals, for the ninth circuit. St. Louis Mining and Milling Company of Montana pl'ff in error *vs.* The Montana Mining Company. Limited. Original citation. Filed November 2d, 1900. F. D. Monckton, clerk U. S. circuit court of appeals, for the ninth circuit.

Due personal service of the within citation is hereby admitted and receipt of copy acknowledged this 29th day of October A. D. 1900.

Dated at Helena, Montana on said day.

THOMAS C. BACH,
EDWIN W. TOOLE,
Attorneys for St. Louis Mining & Milling Co. of Mont., Def't in Error.

Endorsed on cover: File No. 18,002. U. S. C. C. of appeals, 9th circuit. Term No. 214. The Montana Mining Company, Limited, plaintiff in error, *vs.* The St. Louis Mining and Milling Company of Montana. Filed December 18, 1900.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

THE MONTANA MINING COMPANY, LIMITED, PLAINTIFF IN ERROR, *v.* THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, DEFENDANT IN ERROR.	*No.* 213.
THE MONTANA MINING COMPANY, LIMITED, PLAINTIFF IN ERROR, *v.* THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, DEFENDANT IN ERROR.	*No.* 214.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM.

We do not deem it necessary to trouble the Court with more than one brief on our part in the above-entitled causes, at least so far as the motions to dismiss and

affirm are concerned. While there are two records on file, and hence, perhaps, the defendant in error was compelled to make two motions, there is substantially but one case, and cause No. 214 is so dependent upon the decision that may be rendered in case No. 213 that they may well be considered together. The two records simply present two phases of the same case. An action was commenced by the defendant in error in the Circuit Court of the United States, for the District of Montana, on the 19th day of September, 1893 (Printed Record No. 213, p. 6, No. 214, p. 6), to recover a judgment against the plaintiff in error for the sum of $200,000 for wrongfully, unlawfully, and wilfully entering upon one of the veins, lodes, or ledges having its top or apex within the surface location of the St. Louis quartz lode mining claim, and mining, extracting, and taking therefrom large quantities of valuable ore and converting the same to its own use.

The cause was not tried upon the original complaint, but upon a *second amended and supplemental complaint*, filed June 26, 1899 (Record, p. 1). To this second amended and supplemental complaint, the plaintiff in error, defendant in the Court below, filed its answer (Record, p. 7), and thereafter and on the 8th day of August, 1899, the cause came on for trial to the Court and a jury (Record, p. 16). The trial resulted in a verdict in favor of the plaintiff, defendant in error herein, for the sum of $23,209.00 (Record, p. 14), upon which verdict a judgment was subsequently, and on the 16th day of August, 1899, duly entered in said Circuit Court, for said sum, together with costs of action (Record, p. 15).

The defendant, the Montana Mining Company, Limited, being dissatisfied with the judgment, on the 28th day of August, 1899, tendered to the Court a bill of exceptions

(Record 213, p. 16) which was duly allowed, signed and filed. The plaintiff, the St. Louis Company, claiming also to be dissatisfied with the rulings of the Court rejecting certain testimony offered by it, on the same date presented and had allowed a bill of exceptions on its behalf (Record No. 214, p. 16).

Upon the bill of exceptions taken by this plaintiff in error a writ of error was promptly sued out and the citation served October 9, 1899 (Record No. 213, p. 60). The case was argued and submitted to the Circuit Court of Appeals in the month of January, 1900, and thereafter and on the 14th of May, 1900, the Circuit Court of Appeals rendered its decision affirming the judgment rendered in the Circuit Court for the District of Montana (Record No. 213, p. 67). The judgment so rendered thereupon became final, and upon receipt of the mandate from the Circuit Court of Appeals the plaintiff would have been entitled immediately to an execution to enforce it.

On the bill of exceptions which was settled and allowed on behalf of the plaintiff in the case, no action was taken until the 29th day of January, 1900, when its counsel proceeded to file their assignment of errors, and sue out a writ of error (Record No. 214), and the record did not reach the Circuit Court of Appeals at San Francisco until the 26th day of February, 1900 (Record No. 214, p. 49), which was some time after cause No. 213 had been argued and submitted to the Circuit Court of Appeals, but before the decision had been rendered therein.

The cause was thereupon again heard in the Circuit Court of Appeals upon the record contained in No. 214, and the Court, while it did not grant the relief prayed for by the plaintiff in error therein, which was that the "judgment " of the Circuit Court for the District of Montana, be re- " versed and that the said Circuit Court be directed to en-

" ter an order setting aside the verdict and *dismissing the* " *said cause of action*," it did, on the 8th day of October, 1900, without disturbing the judgment which had been theretofore rendered in said cause in case No. 213, make an order that the case be remanded to the Circuit Court for a new trial as to damages alleged, and recovery sought, for conversion of ores between what was designated as the 108-foot and the 133-foot planes (Record No. 214, p. 52). It will be seen by the diagram made by the Court, in its statement of the case (Record No. 214, p. 50), that the apex of the Drumlummon vein, which was the vein in controversy, entered the St Louis claim at a point in its easterly boundary, 520 feet southerly from its northeast corner marked " D," and after traversing a portion of the easterly side of said claim, passes out of the same easterly side line, as shown in the diagram, and returns again into the Nine-Hour claim. It may be that the Court has not correctly shown in its diagram the course of the apex of the vein through the St. Louis ground, or the exact angle made by the vein with the easterly side line of the claim, in its departure therefrom, but this is in a measure immaterial. It is sufficiently accurate to illustrate the contention of the parties. On the trial, the plaintiff, in its proof of damages, had been restricted to ore which had been mined in the Nine-Hour claim at points north of what is designated as its 108-foot plane, which was a projected line drawn downward parallel to what it claimed to be the south end line of its claim. But it further claimed the right to prove damages for ores taken from the Nine-Hour claim up to the point designated as its 133-foot plane, which is the point where it is claimed in the complaint that the foot wall of the vein passes out of the St. Louis ground and into the Nine Hour. In this conten-

tion, as already stated, they were sustained by the Circuit Court of Appeals, and a new trial ordered to ascertain what, if any, ore had been removed from the vein by the defendant between the 108-foot plane and the 133-foot plane. No retrial of any other issue was permissible under the opinion rendered. The verdict of the jury and the judgment of the Circuit Court rendered thereon on the 16th day of August, 1899, and the order of the Circuit Court of Appeals affirming such judgment, were to stand without qualification or modification in any way or manner whatever. If there had been a new trial of this single issue resulting in another jury finding additional damages in favor of the plaintiff, it must have resulted in an additional judgment, and we would have had the anomalous condition of two *final judgments in one action*, on what was presented by the complaint as a *single cause of action*. The judgment already entered could not, for obvious reasons, have been amended so as to include the additional amount which might be found by the new jury on the retrial of this issue.

There is no misunderstanding between counsel as to the condition in which the case was left by these two decisions in the Circuit Court of Appeals. In case No. 213, they attack our writ of error, because they say that the jurisdiction depended entirely upon the diverse citizenship of the parties, and it was not "one in which any "Federal question whatsoever was involved." It is not made a ground of the motion, nor is it contended anywhere in the argument filed in support of the motion, that there is not a final judgment in the case, which would support a writ of error to this Court, if the case were otherwise a proper one for that relief. Such a contention would be futile, and it is not made.

On the other hand in No. 214, the first ground of their motion is—

"1. Because no judgment has been rendered in *this* " case against the plaintiff in error, but the action of the " Circuit Court of Appeals was simply to grant a new " trial *upon certain issues* and no review can be had in " this Court until final judgment has been rendered."

A perusal of the two motions made and now under consideration, must clearly show that there is no disagreement between the distinguished counsel who appear in support of these motions and ourselves, with reference to the scope and effect of the decisions rendered in this case by the Honorable the Circuit Court of Appeals. In case No. 213 there is a valid subsisting final judgment, and it is past all assault or attack from any quarter, unless it be in the Supreme Court of the United States. In case No. 214, on the special issue directed to be tried by the Circuit Court of Appeals, there has been no final judgment.

And if case No. 214 were in truth and in fact a case, and not merely a dismembered fragment of a case, we would frankly admit that we were not entitled to a writ of error in it, and that it ought to be dismissed on the first ground urged in the motion. But it is not in any sense a case or action at law, such as is contemplated by the statutes and the rules of this court forbidding the issuance of a writ of error until there is a final judgment. As already suggested, it is only a dismembered fragment of a case, in which there is a final judgment conceded by counsel to be sufficient in all respects to support our writ of error, if there is a Federal question presented by the record. This dismemberment happened, as we have already seen, through the inexcusable negligence and

delay of the gentlemen on the other side, in failing to sue out their writ of error until the cause had been heard in the Circuit Court of Appeals on our writ of error. If notice had been given us of their intention to sue out a writ of error, it is possible that we might have delayed the hearing on our own writ of error until such time as the case could be heard on both at the same time. Where there are cross appeals of this character, it is manifest that both sides should be heard at the same time, so as to prevent the case from getting into the condition which is presented by the record, and it is possible that the Circuit Court of Appeals, if it had had timely notice of the second writ of error, would have sent our writ of error to the foot of the docket, to await the perfecting of the record on the second appeal; but having heard our appeal and having divided the case, they refused to reunite it again, as they might well have done. We sought by means of a petition for a rehearing to get the two cases reunited, but were unable to do so (see dissenting opinion of Judge Ross, Record No. 214, p. 54).

We were therefore confronted with this situation: Here was a final judgment for a large sum of money, which judgment we believed to be unjust, and which also involved the loss to us of a very valuable portion of our Nine-Hour claim. There was no possible relief from it except by appeal through a writ of error or *certiorari* to this Honorable Tribunal; at the same time here was this fragment of the case, for, at the utmost, not to exceed twenty-five feet, which was not included in the judgment. It presents in and of itself a Federal question, as we shall undertake later to show, of absolutely first impression, and one of great importance. In the exploration and development of quartz lode mining claims, it is a matter of frequent occurrence that a lead is found to enter or pass

out of a mining claim through a side line, instead of what the locator has designated as his end lines, and sometimes this departure, as in the case at bar, is found to be at a very acute angle. Where a lead is found crossing an end line of a claim, and departing through a side line it is now settled law that the extra lateral rights of such vein are governed by the end line crossed, and a projected line parallel to such end line drawn down through the point of the departure of the vein through the side line.

Del Monte Mining Co. v. *Last Chance Mining Co.*, 171 *U. S.* 55.

But, where the lead does not cross the side line at a right angle, through what point is this projected line to be drawn down? Is it through the point where the hanging wall passes through the line, as held by the Trial Court in this case; or is it where the foot wall of the vein passes through such line, as held by the Circuit Court of Appeals; or is it to be drawn midway; or at some other point between the two extremes? We need scarcely urge the importance of this question and the necessity for its speedy determination, regard being had to the interests of those engaged in the highly necessary but hazardous business of mining for the precious metals. Where a lead is in truth a wide one, as this one mentioned in the case at bar is claimed to be, every foot of it, yes, every lineal inch of it, may be worth many thousands of dollars. Considering the importance of this question and the frequency with which it must arise, it seems surprising that it has not already been definitely settled by this Court, and that there are not decisions of it to be found in the courts of last resort of the mining States and Territories and of the several Circuit Courts of Appeal sitting in those States.

If there is any authoritative decision upon this question other than the one made in the case at bar, it is not cited in the opinion of Judge Morrow, and we have diligently sought through many books to find one, but our quest has been in vain. This case is here upon a judgment, which, as we have seen, the counsel on the other side concede to be sufficient to support our writ of error. This important question, though contained in a separate record, is a material part of the same case. Its consideration, to some extent at least, will be necessarily involved in the determination of the main case. Here and here only can the question be finally and definitely settled. It is fairly presented in the record. Why should the motion of the gentlemen on the other side prevail?

There is one thing further we desire to say before taking leave of this branch of the case, and that is, that whatever action this Court may feel itself constrained to take upon these motions, it will take such action and make such orders as will tend to reunite the dismembered fragments of this case. We respectfully submit that if the decisions of the Honorable the Circuit Court of Appeals are to stand, it must result in two final judgments in this action, an anomalous proposition fraught with many dangers, and one which should not be engrafted upon our jurisprudence.

A Federal Question.

Turning now to the consideration of the main case, we shall confine ourselves to the single issue presented by this motion. Is there a Federal question disclosed in this record in such manner as to give this Court jurisdiction, or is it a case where the jurisdiction of the Federal Courts is dependent entirely upon the diverse citizenship

of the parties, and the decision of the Circuit Court of Appeals is final? We think that we may safely rely upon the proposition that this is the only question which this Court will be called upon to consider in passing upon this motion. The eminence in their profession of the gentlemen whose names are found subscribed to this motion is a sufficient guaranty that there is nothing else in the case worthy of consideration except the issue they tender us.

However, before proceeding to the discussion of this question, it may be well to set these gentlemen right on an error or two they seem to have fallen into. On page 7 of their brief they say:

"The jurisdiction of the United States Court was origi-
" nally obtained solely by reason of the allegation that
" the plaintiff was a citizen of the State, and the defend-
" ant an alien."

We think it is safe to say that the jurisdiction of the Federal Courts was originally invoked by reason of the Federal questions appearing on the face of their complaint, and did not rest at all upon the diverse citizenship of the parties to the action. The complaint appearing in the Record, page 1, is the second amended complaint, and there are, therefore, two complaints, the original and the amended complaint, which are not in the record. The summons, however, does appear in the Record, page 5, and is sufficient for our purposes. By the summons it appears that the action as originally brought was not only against the plaintiff in error, but also against Rawlinson T. Bayliss, Alexander Burrell, Isaac Warren, Joseph Harvey, Nicholas Francis, John Jewell, and Thomas Hawkins, one and all citizens of Marysville and of the State of Montana. All of these defendants were found and served

with summons at said town of Marysville. (See Marshal's return, p. 6.) The summons and return are a part of the record.

Gordon v. *Third National Bank*, 144 *U. S.* 97.

The return showing that these personal defendants were found and served at Marysville, Montana, raises the legal presumption that they were citizens of the State wherein they were found, which is the same State of which it is alleged the plaintiff was a citizen.

Jentzen v. *Arizona Copper Co.*, 20 *Pac.* 33.
Minneapolis v. *Ream*, 12 *U. S. App.* 446.
Vatt, Law of Nations, p. 101.
State v. *Blackeno*, 6 *Black* (*Ind.*) 488.
Gordon v. *Third Nat'l Bank*, *supra.*

" A controversy between citizens of different States is " one in which every party upon one side is a citizen of " a different State from every party upon the other."

1 *Foster's Federal Practice, p.* 37, *Sec.* 18.
Blake v. *McKim*, 103 *U. S.* 336.
Removal Cases, 100 *U. S.* 457.
Hyde v. *Ruble*, 104 *U. S.* 409.
Corbin v. *Van Brunt*, 105 *U. S.* 578.
Fraser v. *Jennison*, 106 *U. S.* 194.
Stone v. *South Carolina*, 117 *U. S.* 433.

From these authorities it is apparent that whatever may have been the ground upon which this plaintiff originally invoked the jurisdiction of the Federal Court, diversity of citizenship was not one of them, and jurisdiction was not "dependent entirely upon the opposite " parties to the suit or controversy being aliens, or citi- " zens of the United States, or citizens of different States."

Another error made by the gentlemen is found on page 13 of their brief. They say:

"It is by the petition in error, page 68, folio 133, "that the plaintiff in error first attempts to raise these "Federal questions. It is there that we first hear that "the Court erred in holding that a vein (folio 133 'C') "which enters and departs through the same side line of "a claim has or can have extra-lateral rights under the "laws of the United States."

We think the gentlemen's hearing must be slightly impaired.

The Federal question presented on the face of the complaint was raised at the outset of the trial (No. 213, Record 16, folio 32).

"After the said jury had been duly empanelled and "sworn to try the case, the defendant objected to the "introduction of any testimony on the part of the plain-"tiff for that the second amended supplemental com-"plaint, which had been theretofore read to the jury did "not state facts sufficient to constitute a cause of action "and did (*not ?*) state facts showing that the plaintiff "had no cause of action." The word "not" in italics is a mistake of the printer. The question of the extra-lateral rights attaching to plaintiff's alleged vein was here presented and argued to the Trial Court, and the objection was overruled and the defendant, now plaintiff in error, excepted. This exception was duly preserved in the assignment of errors attached to the petition for writ of error to the Circuit Court of Appeals, No. 213, Rec. p. 49, folio 96, Assignment No. 1, and herein preserved by petition in error, Rec. p. 68, folio 134, Assignment C.

May we not be permitted to express some surprise that the gentlemen did not "hear" of it until the filing of the petition referred to. In support of this assertion we beg to quote from our brief in the Circuit Court of Appeals, upon which the case was argued. At page 20 of that brief we say:

"The complaint shows that the plaintiff has no cause
" of action. The only vein mentioned in the complaint
" is one that enters and departs from the same line of the
" St. Louis claim. The only thing in the complaint from
" which even an inference may be drawn that there is
" another vein within the surface boundaries of the loca-
" tion is found in the fourth paragraph (Printed Record, 6)
" where it is alleged 'that the dip of *one* of the veins hav-
" 'ing a portion of its top or apex,' etc."

From this allegation the barest inference might arise that there was some other vein within the surface boundaries of the St. Louis claim, but in the absence of any direct allegation we are entitled to treat this as being too vague and indefinite to mean anything. At all events, it is upon the presence of this vein within the surface boundaries of the claim, for a part of its distance, that plaintiff bases its right to recover in this action, and having pleaded no other we are entitled to regard this one as being the only lead or vein within the surface boundaries of the St. Louis claim. The paragraph of the complaint to which we have just called attention clearly shows the point at which the hanging wall of the vein enters the St. Louis claim and the point of its departure therefrom, and it is through the same boundary line. The same line cannot serve for both end lines of a mining claim, and if it could the right to follow the lead on its dip would be cut off when the line was reached. Parallel end lines are essential to the existence of extra-lateral rights.

Montana Co. v. *Clark*, 42 *Fed.* 628.
Iron, etc., Min. Co. v. *Elgin Min. Co.*, 118 *U. S.* 196.
Tyler Min. Co. v. *Sweeney*, 5 *Fed.* 284.

Mr. Lindley in his excellent work on mines disposes of this question in a single sentence. He says:

"It seems hardly necessary to discuss the question of "extra-lateral rights as applied to a case where the vein "enters and departs through the same side line."
2 *Lindley on Mines, Sec.* 584.

And he cites with the highest approval the case of *Catron* v. *Old*, 23 *Col.* 433; 48 *Pac.* 687, in which case Chief Justice Hayt in a well-considered opinion very fully sustains this view. The case of *Catron* v. *Old* in its essential features is very like the case at bar. By reference to the diagram which will be found both in the report and in the reference to the case in *Lindley*, it will readily be seen that the south side line of the Fulton lode has about the same angle in it, which is found in the easterly side line of the St. Louis claim, and the apex of the lead passes through the line in each case in about the same way. The difference between the two cases is, that in the former case it was the located lode which was denied extra-lateral right while in the case at bar extra-lateral rights are claimed for a lode accidentally within the surface boundaries of the St. Louis claim. Under the complaint, as it stood when the case went to trial, we think it showed that the plaintiff was not entitled to assert any extra-lateral rights on so much of the apex of the Drum Lummon lode as was found inside the surface boundaries of its claim.

In response to this, the counsel for the defendant in error here, who also represented it before the Circuit Court of Appeals, say in their brief filed in that Court, p. 17:

"The cases cited by the counsel effectually dispose of "the objection to the effect that the vein in question "enters and departs through the same side line. In the "first place it was not alleged to be the discovery vein.

"It was alleged that plaintiff was the 'owner' of it. The "argument as to the sufficiency of that has already been "made. It must be assumed that we are the owner in "some proper manner, the fact being alleged. Being a "by or ancillary vein we had the right to recover upon "it to the entire extent that we had the right to recover "upon the original vein."

In view of these indisputable facts, might we not be pardoned if we expressed some friendly solicitude about the memory of the gentlemen on the other side, as well as about their sense of hearing?

The counsel also fall into another error, when they say, on the same page of their brief, in speaking of this matter of the existence of a Federal question and the time when it was first brought to their attention:

"It is only as the plaintiff in error heard of it inciden- "tally through the dissenting opinion of one of the "Circuit Court judges that it is first raised and now sug- "gested in the way of a petition."

We think we might be permitted to rise to a point of order here. This is an insidious attack upon our reason and perceptive faculties. An attorney who could not see a proposition so clearly averred in the complaint as this one is, would scarcely be able to see the Washington Monument from Pennsylvania avenue. But there is not a word said in the dissenting opinion of Judge Ross (Record in No. 214, p. 54) as to whether there is or is not a Federal question presented in the record in the case. He speaks of the importance of the question and the failure of the Court in its opinion reported in 102 Fed. Rep. 430, to advert to it at all, and expresses the opinion that a rehearing should be granted upon our petition therefor, and that the case together with the one then in hearing

(No. 214) should be set down for reargument, to the end that the question as to whether any extra-lateral rights exist in respect to any vein that enters and departs from a side line only, may be discussed by counsel and fully considered by the Court before final determination. While the question that Judge Ross is talking about is not designated as a Federal question, every lawyer knows that as to whether a vein such as he describes has or has not extra-lateral rights depends entirely upon the proper construction to be put upon the Mineral Laws of the United States, and that no final and definite decision of the question can be made except in the Supreme Court of the United States. It is almost needless to add that if this suggestion of Judge Ross had been heeded we would not have been compelled to trouble Your Honors with these grave questions, with the record in the dismembered and mutilated condition in which we are now obliged to present it.

The Main Issue.

Having seen that jurisdiction of this case did not arise originally from the fact that the plaintiff was a corporation organized under the laws of the State of Montana, and that the defendant was a corporation organized under the laws of Great Britain; that there was a question in it, which we claimed at least arose under a statute of the United States, and hence was a Federal question and that it was not sedulously concealed by us from the gentlemen on the other side and wickedly sprung on them when they had neither time nor opportunity to meet it, we may now proceed to the consideration of the one vital issue. We do not claim, of course, that we have adverted to and sought to set the gentlemen right on all of the errors they have

fallen into in their brief. For example, on page 13, and throughout the entire brief for that matter, they seem to be laboring under the hallucination that we ought to have pleaded this Federal question in our answer. It is a familiar rule of pleading that a general denial puts in issue every single allegation in the complaint, which is well pleaded. They distinctly and unmistakably alleged in their complaint the right to pursue extra-laterally and into our ground a lode, the apex of which, according to their own allegations, entered and departed from the same line of their St. Louis claim. We just as distinctly and unmistakably denied that right, and here was the issue clean cut and well defined. To have labeled this in our answer a "Federal" question would not have availed us anything. To constitute a Federal question, such as gives the Federal Court jurisdiction, it is well settled that it must appear on the face of the plaintiff's pleadings, and the defendant cannot import it into the case by setting it up in his answer.

We will contend that there are three distinct Federal questions presented on the face of this record:

1. Has a vein, the apex of which enters and departs through the same side line of a claim, extra-lateral rights which entitles the owner of the mining claim to pursue it in its downward course beyond such side line and into a mining claim adjoining?

2. Can a miner pursue a vein which passes out of the side line of his claim at an acute angle to such line and follow it in its downward course into the mining claim adjoining, beyond the point where the whole of the apex of such vein is within the surface boundaries of his own claim?

3. On the trial of this case was full faith and credit given to the judgment rendered in the District Court of

the First Judicial District of the State of Montana, in the case wherein the plaintiff in error herein was the plaintiff and the defendant in error herein and another were defendants?

The first two questions appear distinctly on the face of the complaint. The third is first set up in the answer as an estoppel, and is again pleaded in the replication and the judgment roll is offered in evidence by the plaintiff on rebuttal (Record, pp. 32 to 44, both inclusive). The first two propositions seem to us so clearly to be Federal questions that we are almost ashamed to cite authorities in support of our contention. First, the statute:

"The Circuit Courts of the United States shall have "original cognizance concurrent with the courts of the "several States, of all suits of a civil nature, at common "law or in equity, where the matter in dispute exceeds, "exclusive of interests and costs, the sum or value of "two thousand dollars, and arising under the Constitution "or laws of the United States, or treaties made, etc."

Act of March, 1875, Rev. Stats. Sec. 629, Clause 1, as amended March 3, 1887, and corrected August 13, 1888, 25 U. S. Stats. 433.

Says Chief-Justice Waite in *Starin* v. *New York*, 115 U. S. 248:

"The character of a case is determined by the ques- "tions involved, *Osborne* v. *Bank of United States*, "9 Wheat. 824. If from the questions it appears that "some title, right, privilege or immunity, on which the "recovery depends, will be defeated by one construction "of the Constitution, or a law of the United States, or "sustained by the opposite construction, the case will be "one arising under the Constitution or laws of the United "States, within the meaning of that term as used in the "Act of 1875; otherwise not. Such is the effect of the "decisions on this subject, *Cohens* v. *Virginia*, 6 Wheat.

" 264, 379; *Osborne* v. *Bank of United States*, 9 Wheat.
" 737, 824; *The Mayor* v. *Cooper*, 6 Wall. 247, 252; *Gold*
" *Washing, etc., Co.* v. *Keyes*, 96 U. S. 199, 201; *Tennes-*
" *see* v. *Davis*, 100 U. S. 257, 264; *Railroad Co.* v. *Mis-*
" *sissippi*, 102 U. S. 135, 140; *Ames* v. *Kansas*, 111 U. S.
" 449, 462; *Kansas Pacific* v. *Atchison Railroad*, 112
" U. S. 414, 416; *Provident Savings Co.* v. *Ford*, 114
" U. S. 635, 641; *Pacific Removal Cases*, 115 U. S. 1, 11."

What is the use of "fining pure gold." This concise, clear-cut, admirable definition of a Federal question has been cited approvingly in many cases, and has been thus cited by more than one member of this Court.

The case we present falls exactly within the lines of this definition. The plaintiff, in paragraph IV of its complaint, alleges (Record, p. 3):

" That the dip of one of the veins having a portion
" of its top or apex inside of the surface location and
" patented ground of the said St. Louis mining claim is
" to the east and dips under and beneath the said Nine-
" Hour lode mining claim, including the said thirty-foot
" or the compromise ground, which is a part and portion
" of the said Nine-Hour quartz lode mining claim, which
" said portion of said vein has its top or apex within the
" said St. Louis mining claim, as follows, to wit: Com-
" mencing at a projected parallel end line of said St. Louis
" quartz lode mining claim, at a point on the east side
" line thereof, between corners Nos. 1 and 2, extended
" vertically downward, whereat it passes through the hang-
" ing wall of said vein, lode, or ledge, at a point from
" which corner No. 1 being the northeast corner of said
" St. Louis quartz lode mining claim bears north 12 de-
" grees 15 minutes east, distant 520 feet, where said
" hanging wall is disclosed at the surface by an upraise of
" said projected parallel end line, 5 feet west of the east
" side line of said St. Louis quartz lode mining claim;
" thence from where the said projected parallel end line
" passes through said east side line of said claim and

" along the east side line of said claim, between corners " Nos. 1 and 2, south 21 degrees 15 minutes west 512.7 " feet, to a point being the intersection of the said east " side line of said St. Louis quartz lode mining claim, be- " tween corners Nos. 1 and 2, with the west line of the " thirty-foot strip hereinbefore described; thence south " 59 degrees 50 minutes west 108 feet, and along the west " line of the said thirty-foot strip to a projected parallel " end line of said St. Louis quartz lode mining claim, ex- " tended vertically downward, which passes through the " hanging wall of said vein at the surface and at the cross- " ing of the said hanging wall with the west line of the " said thirty-foot strip.

" That it is also the owner of, in possession, and enti- " tled to the possession of an additional portion of the " said apex of said vein lying to the south of the southern " point hereinbefore mentioned, a distance of 25 feet, " whereat the foot wall of the said vein passes out of the " east side line of the said St. Louis lode mining claim."

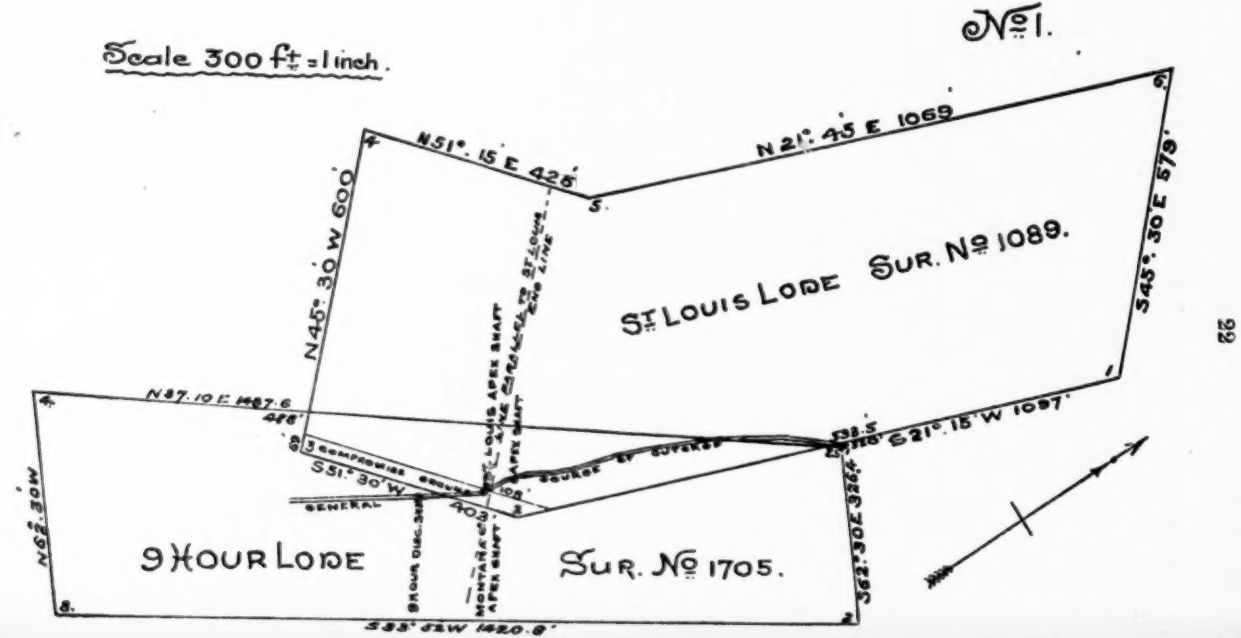
It is not alleged that this claim of extra-lateral right for this particular vein is made under the provisions of Section 2322, Rev. Stats., but that follows without saying. Our answer denies this, and the issue is clearly made and presented.

We present herewith a diagram showing the location of the two claims, so that the Court may more clearly understand the case than it could probably do from the skeleton map found in the opinion of the Circuit Court of Appeals and the one presented by counsel on the other side in their brief. In the complaint it will be observed that the plaintiff has unnecessarily and at great length set out the boundaries of its St. Louis claim. A comparison of the diagram with this allegation in the complaint will show that it is absolutely correct so far as the outline of the St. Louis claim is concerned, and while there is no such ready method of determining the correctness of the out-

line of the Nine-Hour claim, it is immaterial because it is alleged in the complaint that it adjoins the St. Louis claim on the east, and that the vein upon which it claims extra-lateral rights dips into it.

The question here presented is one of great importance, not only to the parties in this case, but to mining men generally. Lode mining claims are only found in rugged mountainous regions. The mountain sides are often much eroded by the elements. The prospector is obliged to make his location before he has had time to thoroughly explore the claim, and it is not an infrequent occurrence to find that the apex of a vein enters a claim through a side line and after traversing it for a greater or less distance, passes out again through the same line. The question as to what extra-lateral rights, if any, attach to such a vein is one of almost first impression. The only decided case thus far is that of *Catron* v. *Olds*, *supra*, where it was held that there could be no extra-lateral rights accorded such a vein. It is settled law that parallelism of the end lines of a claim are essential to the existence of this right, and that what are end lines and what are side lines of a mining claim is to be determined by what lines are crossed by the vein in its entry into and departure from such claim. In the case at bar we contend that in the absence of any allegation in the complaint that there is another lode within the surface boundaries of the St. Louis claim, there is nothing to show which of its lines are end lines or which are side lines, and that our case is exactly on all fours with that of *Catron* v. *Olds*.

There have been many cases involving this question, with the result that the decision by the United States Circuit Court of Montana, now standing approved by the United States Circuit Court of Appeals for the Ninth


No 1.
Scale 300 ft = 1 inch.
N51° 15' E 425'
N 21° 45' E 1069'
S45° 30' E 579'
N45° 30' W 600'
St LOUIS LODE SUR. No 1089.
St LOUIS APEX SHAFT
THE CONTACT OF St LOUIS 2nd LINE
APEX SHAFT
N87.10 E 1487.6
446'
S51° 30' W
SOUDOE ST. SURVEY
S 21° 15' W 1097'
GENERAL
N03°
9 HOUR LODE
SUR. No 1705.
N62° 30' W
S62° 30' E 326'
BROWN DISC. SHAFT
MONTANA CO. APEX SHAFT
S35° 52' W 1420.8'

Circuit, is in direct conflict with a long line of decisions in the United States Circuit Court for the District of Colorado, the earliest of which was the case of *Equator Lode* v. *Colorado Central Lode*, and, among the later, *Turck* v. *Colorado Central*, which, in various forms, is reported in 50 Fed. Rep. 888, 54 Fed. Rep. 262, and 150 U. S. 138, with the result that this question, of great practical importance in mining and in the determination of mining litigation, stands now with contradictory decisions between Courts in different jurisdictions, thus establishing that there is a substantial dispute as to the construction of the Federal statute which governs and determines this right, upon which Courts differ, and therefore is a question which should be determined by the final tribunal in such matters, the Supreme Court of the United States.

Mr. Morrison, in his Mining Rights, Tenth Ed., 1900, at page 135, states the controversy, in its present situation, as follows:

"In the controversy between the Equator Lode and the "Colorado Central Lode, in the U. S. Court at Denver, "the lode was admitted by both parties to be, at the point "of conflict, over 100 feet wide. Each claimed under a "patent conveying a surface of 50 feet, the Equator cov-"ering the southern portion of the apex and the Colo-"rado Central the northern. The Court held that in "such a case each party could hold only to its side line, "and divided the lode by extending the south side line "of the Colorado Central patent vertically downward "through the lode.

"In the case of Bullion Co. *v.* Eureka Co., 11 Pac. 515, "the Supreme Court of Utah were divided, two judges "holding that covering a part of the apex gave a right to "the dip, and the dissenting judge following Hall *v.* "Equator Co.

"All apex rights are a departure from the common law, "and should therefore be strictly construed. The hold-"ing in the Equator case, as far as we know, has been

" uniformly followed by the *nisi prius* Courts, and we " cannot doubt that it is a correct application of the stat- " ute to the subject-matter.

" The reasoning in the Stone Lode case, 15 M. R. 641, " and the Amy Silversmith case, 152 U. S. 222, all tend to " confirm this view, to wit: That the survey must cover " the whole width of the apex to entitle it to extra- " lateral rights."

For a fuller discussion of this question and the positions of the Courts upon it, emphasizing our contention that the Supreme Court must decide this vexed question, we cite *Lindley on Mines*, Vol. 2, Section 583.

WHERE A LODE DEPARTS THROUGH THE SIDE LINE OF A CLAIM, WHERE SHALL THE PROJECTED END LINE BE DRAWN DOWN?

We have already referred to this question briefly in what we had to say with reference to case 214. What we have just said with reference to a vein entering and passing out of the same side line of a mining claim being a Federal question applies with equal force to this question. Its solution depends entirely upon the construction to be put upon the provisions of Chapter Six of the Revised Statutes of the United States. Without citing the authorities let us assume as settled law the proposition so often decided by this and other courts, that the character of the boundary lines of a mining claim can only be determined by the strike of the discovered lode, and that whatever the locator may have designated it when he made his location, that only is an end line which is crossed by such lode—then why should greater extra-lateral rights be accorded to a lode when it passes out of the claim through what the locator has designated as a side line, than it would have if found departing through what he has called an end line? Let the following diagram illustrate this inquiry:

25

Scale 200 ft = 1 inch.
Cor. No. 1
N 51° 15' E 425 ft.
N 38° 30' W
APEX OF VEIN
St Louis
600 ft.
Cor. No. 2
S 51° 30' W 403 ft.
S 21° 15' W.

Let the foregoing figure represent the southerly end of the St. Louis claim as located by the plaintiff. The line B, C, is the southerly end line. The line 1, 2, represents the foot wall of a lode which passes out of the claim through the located end line. The line 3, 4, is the hanging wall, and the dip is shown by the dip arrow. In pursuing this lode on its dip there can be no controversy, under the provisions of the chapter referred to, that the miner would be obliged to stop when he reached a point vertically under the line B, C, until he had reached a point far enough easterly, so that in following the lode on its dip he would pass out of his own claim under the line A, B, if that is in truth, what plaintiff has called it, a side line of the St. Louis claim.

Of course, if the lead on its strike should be found to pass out of the line A, B, then that, too, under the decisions of this Court, would become an end line, and its extra-lateral rights would be cut off again by that line. The law seems clear upon this subject:

"But their right of possession to such outside parts of
"such veins or ledges shall be confined to such portions
"thereof as lie between vertical planes drawn downward
"as above described, through the end lines of their loca-
"tions, so continued in their own direction that such
"planes will intersect such exterior parts of such veins
"or ledges."

"And nothing in this section shall authorize the locator
"or possessor of a vein or lode, which extends in its
"downward course beyond the vertical lines of his claim
"to enter upon the surface of a claim owned or possessed
"by another."

U. S. Rev. Stats. Sec. 2322.

We respectfully submit that there is nothing in the statute which would give to a side line, which becomes an end line of a mining claim by reason of the fact that the lode on its strike crosses it, greater rights than would attach to an end line which the locator had designated as such, and which, in truth, is an end line. In either case it must be held to be an end line which cuts off all pursuit of the vein beyond it.

Another more serious and an insuperable objection to fixing the line at what the plaintiff calls its 133-foot plane is, that it gives the lead on its strike to the plaintiff beyond the end line of its claim, and does precisely what the clause just quoted from Sec. 2322 says shall not be done. In this connection we desire to direct the attention of the Court to the fact that at this point the pay ore in the Drum Lummon vein comes practically to the surface. The witness Keerl (Record, p. 19), says:

"Block No. 9 is the stope above the twenty-foot level, "lying north of the 108-foot plane and east of the west "line of the thirty-foot strip."

As a miner would phrase it, the Drum Lummon lode at this point is practically in ore from the "grass roots "down."

In order to better illustrate the position we are trying to urge upon the Court, let us have recourse to another diagram:

Let A, B, represent the projected imaginary line drawn down parallel to the south end line of the St. Louis claim, or running north 45 degrees 30 minutes west as drawn by the Circuit Court, and the line C, D, as the line drawn in the same direction by the Circuit Court of Appeals, but through the point of intersection of the hanging wall of the vein with the east side line of the St. Louis claim,

DRUMLUMMON
Louis
Compromise Ground
Cor. № 2
198 ft plane
133 ft plane
A.
D.
E.
N 45° 30' W.
N 45° 30' W
B.
C.
EAST SIDE LINE
APEX
Hour
Nine

and we have the triangle A, D, E, wholly within the surface of the Nine-Hour ground, and on the hanging wall side the vein has been taken on its strike from A to E beyond the end line of the St. Louis claim. It is unnecessary to argue to this Court that if any projected end line is to be drawn down through our mining claim the point of departure fixed by the Circuit Court was right and the one fixed by the Circuit Court of Appeals was clearly and palpably wrong. If the plaintiff in error here had taken a million dollars out of its Nine-Hour claim, between the points the defendant in error designates as its 108-foot and its 133-foot planes it could not be made to account for a dollar of it, even if its Nine-Hour claim was a mere unpatented location, and even if the defendant in error had not made it a deed conveying to it not only the surface of this compromise ground, but every penny's worth of mineral therein contained as well.

Still another reason why the Circuit Court of Appeals was in error on this question. The statute gives the locator of a mining claim "the exclusive right of possession and enjoyment of all the surface included within their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically."

U. S. Rev. Stats., Sec. 2322.

Mark this language: The "top" or "apex," not any part of the top or apex. The Circuit Court of Appeals reads into the statute by its decision "*any part of the top or apex.*" Recurring again to Figure 3, it will be readily seen that from the time the hanging wall crosses the east side line at A, until the foot wall passes through the same line at D, the St. Louis has only a part of the apex of the lode, which gradually grows less and less until it is en-

tirely cut off at D. Something is said in the opinion of the Circuit Court of Appeals about drawing the line midway between the walls and giving each side one-half. Under the statute this would have been error also, differing only in degree from the error the Court fell into when it said that the projected end line should have been drawn down at the point where the foot wall of the vein intersected the side line of the St. Louis claim.

There cannot possibly be two opinions among lawyers that the Circuit Court of Appeals was clearly and palpably wrong in its opinion rendered in case No. 214. No difference how munificent a recovery the plaintiff might be able to secure on the trial of this issue, this Court, beyond the preadventure of a doubt, would set it aside, and the Circuit Court of Appeals for the Ninth Circuit might possibly do so upon further and fuller argument and more mature deliberation. If this is so, then why should this poor little dismembered fragment, embraced in No. 214, be treated as if it were, in fact, a case within itself, and not merely as it is, in fact, a single question, though a very important one, in a case full of great questions. Why should we be remitted back to the Circuit Court for the District of Montana, to be compelled to work our way up here again with this question, backed with a final judgment of that Court and the Circuit Court of Appeals to the end that this Court may finally settle it? Would the question be presented one whit clearer than it is by the present record, or would either of the parties to this controversy be benefited a single farthing by the delay, loss, and expense that would be necessarily incurred in doing so? Is not the law as administered by this exalted tribunal the perfection of human reason?

A judgment ought to be an entirety. There is in this case but a single cause of action stated in the complaint,

and there ought not to be two judgments. An appellate court ought not to affirm an entire judgment in part and reverse it in part.

Langley v. *Grill*, 1 Col. 71.
Buris v. *Johnson*, 24 Ky. (1 *J. J. Marsh*) 196.
Story v. *N. Y. & H. R. Co.*, 6 N. Y. 85.
Goodsell v. *W. U. Tel. Co.*, 109 N. Y. 149.
Wolstenholm v. *Mfg. Co.*, 64 N. Y. 272.

WAS FULL OR ANY FAITH ACCORDED THE JUDGMENT PLEADED AND INTRODUCED IN EVIDENCE BY THE PLAINTIFF?

The judgment roll in the case referred to in the defendant's answer and specially set up in the replication of the plaintiff, appears in the Record, pp. 32 to 44. It is known as the "*Specific Performance Case*." It was brought upon a certain bond for a deed, made March 7, 1884, by Charles Mayger, who was the predecessor in interest of the St. Louis Company, to William Robinson *et al.*, who were our predecessors in interest in the Nine-Hour claim. It was an agreement to convey to our predecessors in interest upon the consideration therein named the "Compromise "Ground," together with all of the mineral therein contained, without any reservations or exceptions whatever. Charles Mayger, the grantor named in our bond, in violation of that instrument, on or about the 10th day of June, 1893, conveyed this strip of ground to the St. Louis Mining and Milling Company, who had full notice of our rights in the premises. This Company, the defendant in error here, refusing to make a conveyance to us, suit was brought in the First Judicial District Court of the State of Montana, to enforce the performance of the obligations con-

tained in said bond, and the findings of fact and the judgment rendered therein appear in the record at pages 40 to 44, both inclusive. The Court found as conclusions of law:

I.

"The plaintiff is entitled to a conveyance from the "said defendant of and for the premises particularly men- "tioned and described in the said bond known as the "'Compromise Ground.'"

II.

"That the said defendants and each of them should be "enjoined and perpetually restrained from asserting any "right, title, or interest of any kind or character in or to "the said compromise ground, or any part or portion "thereof, and from, in any manner, interfering with the "possession or enjoyment thereof by plaintiff."

The judgment orders a conveyance to be made to us describing the compromise ground by metes and bounds, together with all the mineral therein contained, and the deed, being in the form prescribed by the Court, appears on pages 10 and 11 of the Record.

An appeal was taken by the defendant in error, to the Supreme Court of the State of Montana, and the decision of that Court appears in 19 Mont. 313, 51 Pac. Rep. 824. From the judgment in the Supreme Court of Montana the case was brought to this Court on writ of error and was again affirmed, 171 U. S. 650.

The question as to whether full faith and credit or any faith and credit was given to this judgment in the trial of the case at bar, is a Federal question. The Constitution of the United States, Art. 1, Sec. 4, provides that,

"Full faith and credit shall be given in each State to "the public acts, records, and judicial proceedings of "every other State, and the Congress may, by general "laws, prescribe the manner in which such records shall "be proved and the effect thereof."

Sec. 905 of the Revised Statutes of the United States was passed to carry this Constitutional provision into effect. In it we find this provision:

"The said records and judicial proceedings so au- "thenticated shall have such faith and credit given to "them within every Court of the United States as they "have by law or usage in the Courts of the State from "which they are taken."

The judgment in the Specific Performance Case expressly directs, as we have already seen, the conveyance by metes and bounds to the plaintiff in error of the "Compromise Ground," *together with all the mineral therein contained*, without any exceptions or reservations whatever, and it expressly restrains and forever bars the said plaintiff in the Court below, from all interest or claim in or to the said premises, or to any part or portion thereof, or to the possession of the same or any portion thereof. The judgment of the Circuit Court and of the Circuit Court of Appeals denies all force or effect to this judgment, beyond compelling the execution of the deed, no claim being made that the said District Court of the State of Montana did not have jurisdiction of the subject matter, or of the parties to the action, or that the said judgment was void for any other reason whatever. As every pound of ore for which the plaintiff was claiming to recover, came out of this "Compromise Ground," one of the principal contentions, both in the Circuit Court and the Circuit Court of Appeals, was the force and effect to be given the judgment.

Under the constitutional provision and the statute already quoted, judgments rendered in a State Court are recognized as binding in the Federal Courts, and the same force and effect are to be given them as they would have in the Court wherein they were rendered.

In *Mills* v. *Duryea*, 7 Cranch, 481, which is said by Mr. Justice Miller, in *Green* v. *Van Buskirk*, 5 Wall. 309, 310, to be the leading case on this subject, it was claimed that the effect of this constitutional provision and of the statute was simply to make such judgment admissible in evidence, but did not declare the force or effect of such judgment when thus admitted in evidence. This contention was promptly overruled, and Mr. Justice Story declared,

"It remains only then to inquire in every case what is "the effect of a judgment in the State where it is ren- "dered."

The doctrine of this case has never been questioned. It is as sound law to-day as it was when it was first handed down.

McElmoyle v. *Cohen*, 13 Pet. 326.
Christmas v. *Russell*, 5 Wall. 302.
Green v. *Van Buskirk*, *Ibid* 310.
Crapo v. *Kelley*, 16 Wall. 637.
Hilton v. *Guyot*, 151 U. S. 182.
Mutual Life Ins. Co. v. *Harris*, 97 U. S. 336.
Dow v. *Johnson*, 100 U. S. 186.
Dillingham v. *Hawk*, 60 Fed. 498.
Chuan v. *Wilson*, 9 Wll. 123.
Thompson v. *Whitman*, 18 Wall. 457.
Hampton v. *McConnell*, 3 Wheat. 235.
D'Arcy v. *Ketchum*, 11 How. 175.
R.R. Co. v. *Wiggin's Ferry Co.*, 119 U. S. 622.
Alkire Gro. Co. v. *Richesin*, 91 Fed. 83, *et passim.*

We call special attention to the case last cited for the reason that it expressly holds the judgment of a State Court estops parties from raising a question thus decided in the Federal Court, judgment having been obtained in the same State in which the Federal Court sat.

Now irrespective of what was the character of the property; what was the situation of the parties; what were the issues in the action, are we not narrowed down to the simple and single inquiry, what was the judgment of the State District Court? And when we reach this inquiry is there any possibility of being mistaken in the answer? Does it admit of any possible doubt or uncertainty? Is it not that this defendant in error should convey to us by a good and sufficient deed of conveyance the "Compromise Ground," describing it by metes and bounds TOGETHER WITH ALL THE MINERAL THEREIN CONTAINED? It is not all the mineral therein contained save and except such as may be found in leads having their tops or apices within the surface boundaries of the St. Louis claim. The Circuit Court and the Circuit Court of Appeals read that into the judgment. It was not put in by the District Court of Montana and it was distinctly shown that it did not intend to put it in there by the judgment it rendered and the form of deed it prescribed for the conveyance of the property. The words "*together* "*with all the mineral therein contained,*" are expressly made a part of the description of the property to be and which is conveyed. Counsel for the defendant in error are vehement in declaring that in construing this judgment regard must be had to the character of the property to which it relates. To this we agree, but about the most important thing in a mining claim is the mineral therein contained. A strip of barren mountain side, thirty feet in width and four hundred feet in length is of no value

to us without the mineral therein. In other words, they insist on sucking the orange, and asking us to content ourselves with the rind. If the judgment is too broad; if it should have excepted from its operation such mineral as might be found in the Drum Lummon lode in the Compromise Ground, or mineral in any lode having the whole or any part of its apex within the surface of the St. Louis lode, then they should have seen to it that their rights were fully protected by inserting in the judgment apt and appropriate words for that purpose. If the judgment is broader than the contract upon which it is based; if in point of fact it embraced the entire St. Louis lode with all the mineral therein contained, it is now too late for them to object to it on that score. They must stand or fall upon the plain, unmistakable language of the judgment as it is written, for behind this judgment is the constitutional guaranty and the Act of Congress we have cited above.

On such an absolutely plain and simple proposition it seems like imposing on this Court to do more than barely state it; and yet we have had, as we think, such undeservedly bad luck in getting either of the lower Courts to see this proposition as we see it, we feel as if your Honors will pardon us for going a little further into the question. The deed was not a voluntary one. It was only executed after a long and hotly contested trial and in pursuance of the order of the Court prescribing both its form and contents. We are, therefore, relieved of all inquiry as to the intention of the parties in making it. This is the question that the Circuit Court of Appeals, in our judgment, goes wrong on. What was the intent of the parties making the bond for a deed upon which the Specific Performance case was brought, was an issue in that case, was fought out to a finish, and under the authorities above

cited cannot now be re-examined either in the Circuit Court or the Circuit Court of Appeals, or in any other judicial tribunal.

The defendant, in its answer filed in that case (Record p. 37), denies that we are the owners of the Compromise Ground, or the mineral therein, and aver that the same was at all of the times mentioned in our complaint a part of the St. Louis lode mining claim. It denies that their predecessors in interest had wrongfully or otherwise, at the time of the survey of the St. Louis lode for patent, extended the easterly boundary line of the said St. Louis lode mining claim over the Nine Hour, and it avers that the boundary lines of the St. Louis claim as surveyed, was as the same were originally located and embraced the "Compromise Ground," and every part thereof before the location of the Nine-Hour claim; and it is further averred that the defendant is in possession, and entitled to the possession of the same and every part thereof, save and except a small strip occupied by sufferance by the plaintiff as an ore house. It is admitted that after application for patent for the St. Louis claim had been made Robinson and others filed an adverse claim upon which suit was subsequently brought. That in settlement of this controversy Charles Mayger, their predecessor in interest, executed the bond sued on, but they aver "that the said adverse "claim aforesaid was interposed for the purpose of harrassing and delaying said Mayger from obtaining a patent "to said St. Louis mining claim, and that the said bond was "executed as a compromise to avoid the same; all of which "was done contrary to equity and good conscience and for "the sole purpose aforesaid." If every one of the issues presented by this answer was true, and this judgment were the most unjust and inequitable ever rendered by a judicial tribunal, it is now forever too late to question it. As

already said, an appeal was taken to the Supreme Court of the State of Montana, where the issues were carefully re-examined and the judgment affirmed. A writ of error was then sued out from this Court and the case carried to the Supreme Court of the United States. We did not see that any Federal question was involved, and therefore made a motion to dismiss the writ of error and affirm the judgment. The plaintiff in error claimed that the contract made by the original bond was contrary to the policy of the law, and thus necessarily raised a Federal question. Without determining whether this was or was not a Federal question sufficient to sustain the writ, you, in effect, held the affirmative by proceeding to carefully re-examine the issues and affirm the judgment (171 U. S. 650). We say, therefore, that the judgment is as absolutely unassailable as though it had been graven on one of the tablets of stone brought down by Moses from the burning Sinai. The intent with which the bond was made, the property that it conveyed, and every issue that was raised or might have been raised under the pleadings in that case, are settled and forever set at rest by the judgment rendered therein.

In determining what are the rights of the parties in this case we have only to keep our eyes steadily fixed on the judgment in the Specific Performance Case and we cannot go wrong. Has the plaintiff the right to the mineral found in the Compromise Ground, in a lead that has its apex or a part of its apex in the St. Louis claim west of the west boundary line of the Compromise Ground, which is claimed to be the east side line of the St. Louis? No! Because that was an issue in the Specific Performance Case, settled and forever set at rest by the judgment therein. May plaintiff enter on the surface of the Compromise Ground and take the triangular portion thereof

shown in figure No. 3? No! The judgment bars him and he is forever enjoined in any court or place from even claiming the right to do so.

"Together with *all*." Can there be any possible doubt of the import of this language so as to require the Court, or justify the Court in so construing it as to give it any other meaning than that commonly understood? Charles Mayger, at the time he made the bond, had the right to convey the whole of the St. Louis claim, or a part of it. He could convey the surface to one grantee and the mineral to another; he could convey the surface or the mineral separately or jointly as he saw fit. This has long been settled. Messrs. Barringer and Adams, in their excellent work on mines, say:

"Though minerals undisturbed, or in place, are a part
"of the freehold, and as such usually belong to the owner
"of the soil, they are capable of separate ownership and
"distinct possession. Where there is such a severance
"of estates, the minerals are real estate constituting a
"separate corporeal hereditament, capable of distinct in-
"heritance and conveyance. There may be further sep-
"aration of the different strata, or of minerals of different
"kinds, each of which may have a different owner and
"constitute a distinct estate in land. Moreover, the grant
"of the permanent or absolute interest in the minerals
"effects such a severance and is equivalent to a convey-
"ance in fee of the estate in the minerals separate from
"that of the owner of the soil."

Barringer & Adams, Law of Mines, p. 35.

The District Court of Montana found that the plaintiff's predecessor in interest contracted with our predecessors in interest that if they would dismiss their suit in Court and withdraw their adverse claim in the United States local Land Office he would execute to them a deed for the "Compromise Ground," with all of the mineral contents

therein, without regard to where the apex of the lode might be in which such mineral was found, and in the same conveyance he was to convey to them every right, title, or interest which he might have either legally or equitably in and to said piece of ground and everything therein contained. This is the judgment of the Court as clearly expressed as the English language is capable of expressing human ideas. Shall full faith and credit be given this judgment, or shall it be said this language does not mean all, but only means such mineral as may be found therein in leads whose apices are found within the surface boundaries of the Compromise Ground? Would this judgment have been one whit more clear if it had directed the conveyance of the Compromise Ground to us with every right to which the grantor was entitled under the terms and provisions of the Act of Congress of May 10, 1872, and any and every other Act of Congress relating to the disposition of the public domain?

The words "together with" in connection with a previously-mentioned subject in a deed or power operate to enlarge and not to restrain that which was previously granted.

Winter v. *Loveden*, 1 Lord Raymond, 267.
Cardigan v. *Armitage*, 2 Barn & Cres. 197.

The words "together with" are equivalent to the word "also," which means "likewise," "in like manner," "in addition to," and denotes that something is added to that which precedes it.

Panton v. *Tafft*, 22 Ill. 166.

If the deed in question had simply conveyed the premises without expressly conveying the mineral; if it had been entirely silent on this subject, we would still

have been entitled to all of the mineral which is accorded to us by the Circuit Court and the Circuit Court of Appeals. Both of these Courts refuse to give any significance whatever to the words "together with all the minerals therein contained," though found in the description of the property conveyed, and in the judgment of the Court ordering such conveyance.

ESTOPPEL BY DEED.

Suppose the deed made in this case were not a part of the judgment of the Court, and that it was simply a conveyance of the Compromise Ground without any reference whatever to the mineral therein contained. What then would have been the respective rights of the parties? It cannot be doubted that we would have been entitled to all mineral found in veins having their tops or apices within the surface boundaries of the ground thus conveyed. But how would it have been with the defendant in error? Would it have been entitled in the absence of any reservation of extra-lateral rights in its deed to have followed into the ground thus conveyed such portion of the vein as had its apex within the surface boundaries of the St. Louis claim?

"The general rule of the common law was that who-
" ever had the fee of the soil, owned all beneath the sur-
" face."

Del Monte Mining Co. v. *Last Chance M. Co.*, 171 U. S. 55, 60.

The rule is that whatever is in derrogation of the common law, is to be strictly construed, and the decisions both State and Federal clearly recognize this rule.

Morrison's Mining Rights, p. 112.

The doctrine of extra-lateral rights is clearly in contravention of the common law. There is nothing in the statute giving the right of lateral pursuit any of the qualities of a covenant running with the land, or making it inalienable except in express terms. It would seem to follow that unless this right was preserved in the deed by fit and appropriate words of exception from the grant, everything contained in the land would pass by the deed and the grantor would be estopped from thereafter asserting this right as against his grantee. The Government of the United States occupies no different plane, when it comes to dealing with its real estate, than does any other owner of that species of property. When it comes to make a conveyance, *i. e.*, a patent of a mining claim, it does two things with reference to extra-lateral rights. First, it conveys to its grantee the right to pursue the vein found within the surface boundaries of the claim in its downward course, though it passes under the vertical side lines of his claim and into the premises adjoining; and secondly, in express language it excepts from the grant made, and reserves to an adjoining owner the right of extra-lateral pursuit. If the reservation is necessary in a patent in order to give an adjoining owner this right, then it is equally necessary in a deed, and a grantor not reserving it would be thereafter estopped by his deed from asserting it against his grantor. The decisions upon this question are scanty, but so far as they go they seem to support our contention.

In the case of *Stinchfield* v. *Gillis*, 107 Cal. 86; 40 Pac. 98, the Court says:

"The effect of the deed from Gillis to plaintiff was to "estop him and those claiming under him from ques- "tioning the title of the plaintiff to all the gold that

" might be found in the west vein, within the surface line " of his deed. The gold in controversy was found within " the surface lines of this deed, and it was also found " within the limits of the two walls forming the west " vein, although the place at which it was found is also " within the lines of the walls which form the Rice vein. " This latter circumstance does not, however, relieve " Gillis from the estoppel of his deed, for, as the deed " contains no reservations, and as there was no evidence " at the trial of any mining customs, effect must be given " to the deed according to its terms by holding that the " entire west vein within the surface lines, even though " intersected by another, passed to the plaintiff."

The facts in this case are found in the opinion of the Court on a former appeal, 96 Cal. 400; 30 Pac. 839. On and prior to January 17, 1886, Gillis was the owner of the "Carrington" claim. On that day he sold to Stinchfield a portion of his claim known as the Pine Tree Mine, conveying the same to him by a simple bargain and sale deed. At this time one Rice was working on a portion of the Carrington claim not included in the sale to Stinchfield, which was known as the Rice vein. The apices of two veins, called respectively the "West" vein and the "Pine Tree" vein, were within the surface boundaries of the Pine Tree claim, while the apex of the Rice vein was on that portion of the claim not sold to Stinchfield. Immediately after the sale to Stinchfield Gillis made a new location on the part not sold, and a few days afterwards Stinchfield also made a new location on the part of the claim he had purchased from Gillis. In other words, both parties abandoned the "Carrington" location, and each for himself made a new location of his part of the claim, Gillis being the elder. Rice, who was working for Gillis, followed his vein down to where it intersected the "West" vein, under the surface conveyed

to Stinchfield and removed ore at the point of the intersection of the two veins, of the value of about $10,000. Stinchfield brought suit against Rice and Gillis to recover for this trespass, and notwithstanding his was the junior location, recovered judgment. Under the provisions of Sections 2336, U. S. Rev. Stats., providing that all ore in the space of the intersection of two veins, shall belong to the prior locator, Gillis would have been entitled to the ore but for the estoppel created by his deed. If one right of this character conferred by the statute may be thus lost, another right of the same character may be lost in the same way.

Another case directly involving this right of extra-lateral pursuit is that of *Boston & Montana Consolidated C. & S. Co.* v. *Montana Ore Purchasing Co.*, 89 Fed. 529. The plaintiff had sold a portion of its Johnstown lode claim to the defendant and conveyed it by metes and bounds. The westerly line of the deeded portion ran from a point about a third of the way across the claim from its northern boundary to the south side line of the claim in a southwesterly direction. The end lines of the Johnstown ran nearly north and south, and plaintiff's contention was that the defendant's extra-lateral rights should be confined to a plane drawn down parallel with the end lines of the claim. This would have made a very considerable triangular piece of ground embraced in the deed practically worthless. The Court held the plaintiff estopped by its deed and refused to grant it the injunction prayed for. It seems to us that these cases only apply the general doctrine of estoppel by deed to this class of property, and that they are sound law.

AUTHORITIES CITED IN SUPPORT OF MOTIONS NOT APPLICABLE.

In support of the motions to dismiss the writs of error, counsel therefor have cited *Colorado Central Mining Company* v. *Turck*, 150 U. S. 143, and other cases. The Turck case was decided upon the question of the right of a writ of error to this Court upon the ground that it appeared from the original complaint that jurisdiction in the Federal Court was made to depend entirely upon the diversity of citizenship of the parties, and hence is not applicable to this case. When the original complaint in this case was filed, jurisdiction did not depend entirely upon the ground of diversity of citizenship, or at all upon that ground, for, as we have pointed out above, that ground did not exist and could not have existed in the original complaint, and in the amended complaint, upon which the case was tried; a Federal question was by its allegations presented, along with a statement of the diversity of citizenship of the defendants then remaining upon the record, from which it results that it cannot now be claimed that jurisdiction was made to depend entirely upon diversity of citizenship. The facts presenting the Federal question and diversity of citizenship are both alleged in the complaint, and left to the legal effect which naturally follows from them, neither being specifically designated as the ground of jurisdiction. The difference between this case, as we have presented it, and the *Colorado Central Mining Company* v. *Turck*, upon this question, and the line of cases cited by counsel in support of their motions, is so great and clearly marked that we do not feel we would be justified in taking up and discussing each case separately.

Conclusion.

By reference to our assignment of errors, it will readily be seen that we have made no reference in the foregoing argument to very many important questions presented on the face of the record, but we do not deem it necessary to do so upon the discussion of these motions. Consideration of them, and of the grave questions herein presented, can be more properly had upon the hearing of this case on its merits, and we feel sure that this Court will not dismiss these writs of error until it has heard full argument and carefully weighed and considered every proposition contained in them.

In this brief we have discussed, but not at length or completely or as fully as we would upon a hearing upon the merits, some questions other than those relating to the jurisdiction of the Court; and this has been done because of the presentation of a motion to affirm the judgment. That weighty questions are involved, we think has been clearly demonstrated. The apex law which is involved in this discussion is of serious consequence, fruitful in litigation, the occasion of great expenditures, the subject of much hostile criticism, and all of its many doubtful and uncertain interpretations should be as speedily set at rest as possible in the interest of the great industry with which it is inseparably connected. The Courts have held that the doctrine of extra-lateral rights is contrary to the settled principles of the common law, and to be strictly construed, and the earliest possible disposition of all questions growing out of it which affect the title to mines, is essential to the proper protection of the mining industry. The plaintiff in error complains of what it conceives to be an erroneous construction of the apex law, a construction contrary to the rules which should

be applicable to its interpretation, and presents a substantial case, and not a frivolous controversy in which it has suffered, as it believes, grievous wrong. The interpretation now placed upon the judgment and deed involved, and upon the apex law, takes away from it that which it received as the result of litigation and location, and gives it to the defendant in error, whose contradictory positions are well illustrated by the allegations of its answer in the specific performance suit and its replication in the present action, which are here called to the attention of the Court as indicating to some extent the methods of which the plaintiff in error complains, viz:

"Aver that the boundary lines of said St. Louis min-
" ing claim as originally located included and embraced
" the said *locus in quo*, and every part thereof, at and
" prior to the location of said Nine-Hour lode claim, and
" that said Charles Mayger and his successors in interest
" hath ever since been, and now are, in possession of the
" same, and entitled thereto. * * *"

Answer in Specific Performance Case (Record, page 38).

"And plaintiff alleges the fact to be that said thirty-
" foot strip, or Compromise Ground, was at all times a
" part and portion of the quartz lode mining claim known
" as the Nine-Hour claim, and that the same was never a
" part or portion of the St. Louis quartz lode mining
" claim mentioned in the complaint herein. * * *"

Replication in present action. (Record, page 13.)

The plaintiff in error, therefore, contends that important Federal questions are presented in this case; that the right to the writ of error is clear; that there is nothing frivolous or vexatious in the prosecution of its writ of

error, and that the case should proceed to a final adjudication of these important matters by this tribunal, clothed with the power to set at rest these questions which have vexed State and inferior Federal courts, and the importance of which, not only to the plaintiff in error in this case, but to those interested in mining generally is, we believe, apparent.

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IN THE

Supreme Court of the United States.

THE MONTANA MINING COMPANY, Limited, *Plaintiff in Error*,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, *Defendant in Error.* } No. 213.

THE MONTANA MINING COMPANY, Limited, *Plaintiff in Error*,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, *Defendant in Error.* } No. 214.

This cause is pending in this court on a motion to dismiss and affirm made by the Defendant in Error, and in our brief in opposition to that motion we fully explained how it happened that there are two records here, while there is really but one case. The record in No. 214 is the record upon a writ of error sued out by Defendant in Error from the Circuit Court of Appeals, to the Circuit Court of the Ninth Circuit for the District of Montana, to correct an alleged error made by that court in the trial of case No. 213. Upon the motions to dismiss and affirm, we presented everything we had to

say upon either branch of the case in one brief, and believing that this is the proper course to pursue, as tending to lighten, in some degree at least, the labors of the court, we will present the whole case in this single brief upon the merits. As to the questions discussed in our brief now on file, we will content ourselves with what we have said in that brief, and take up here the other features of the case which were not pertinent to the discussion in opposition to the motions of the Defendant in Error.

Statement of the Case.

The Defendant in Error, the plaintiff in the Circuit Court of the Ninth Circuit for the District of Montana, alleges in its second amended and supplemental complaint (Record 213, p. 1) that it is the owner of the St. Louis Quartz Lode Mining Claim, situate in Ottawa Mining District, County of Lewis & Clarke and State of Montana, and of the quartz rock and ore and precious metals contained in any and all veins, lodes and ledges of mineral bearing rock through their entire depth, the top or apices of which, lie within the surface lines of the said mining claim, *save and except* that portion thereof known as the thirty-foot strip or Compromise ground, which, it is alleged, belongs to and is a part of what is known as the Nine Hour Lode Mining Claim, together with all mineral contained therein, which is the property of the defendant, the Montana Mining Company, Limited. It is further alleged that the dip

of one of the veins having a portion of its top or apex inside of the surface location and patented ground of the St. Louis mining claim, is to the east, and dips under and beneath the Nine Hour mining claim including the thirty-foot strip or Compromise ground. The portion of the vein having its top or apex within the St. Louis claim is described as entering the claim at a point on the east side line thereof, at a point from which corner No. 1, being the northeast corner of said mining claim, bears north 12 degrees 15 minutes east, distant 520 feet, thence along said east side line and the westerly side line of the Compromise ground, to a point 108 feet from the point of intersection of the west side line of the Compromise ground, with the east side line of the St. Louis claim, between corners numbered 1 and 2, at which point, it is alleged, a projected end line parallel with the end line of its claim should be drawn down, as being the point where the hanging wall of the vein intersects the westerly side line of the Compromise ground. It is next alleged that the plaintiff is the owner of an additional portion of the said vein lying to the south of the southern point above mentioned, a distance of twenty-five feet, at which point the foot wall passes out of the east side line of the St. Louis Lode Mining Claim.

It is alleged that the defendant, Plaintiff in Error here, wrongfully and unlawfully, by means of drifts, shafts and underground workings, entered upon said vein on or about the 20th day of June, 1893, and mined and extracted therefrom quartz rock and ore of the value of $250,000, for which sum judgment is prayed.

The answer of the defendant (Record No. 213, p. 7) admits the allegations contained in paragraphs numbered 1, 2 and 3 of the complaint, which relate to the incorporation of the respective parties to the action, and to the ownership of the respective mining claims mentioned, and denies every other allegation contained therein. It then pleads affirmatively, and as new matter, a judgment rendered in the District Court of the First Judicial District of the State of Montana, within and for the County of Lewis & Clarke, wherein this Plaintiff in Error was plaintiff and the Defendant in Error was defendant, in and by which said judgment the Defendant in Error was ordered, adjudged and decreed to convey to the Plaintiff in Error the thirty-foot strip or Compromise ground, together with all mineral therein contained, and, it is averred that the plaintiff, the Defendant in Error here, was thereby estopped from claiming any part of the Compromise ground, or the mineral contained therein.

To this new matter the plaintiff replied (Record 213, p. 12), and after denying that it was for any reason estopped from claiming the mineral found in said Compromise ground, it admits the making, execution and delivery, by its predecessors in interest, of the bond for a deed, which was the basis of the action against it for specific performance; admits the judgment rendered, and the execution of the deed in pursuance thereof, but alleges that no other right or title was conveyed other than such as was attached and incident to said Compromise ground, as a part of the Nine Hour Lode Claim, and

that it comprised only such minerals as were contained in veins, lodes or ledges having their tops or apices inside said thirty-foot strip, all of which, it was alleged, would more fully appear by reference to the judgment roll in said cause, which it prayed might be considered by the court as if fully set forth by it in its replication.

The history of the "thirty-foot strip" or "Compromise ground" so frequently mentioned, may be gathered, so far as it is material for this case, from the record of the Specific Performance case (Record 213, p. 32). As originally located there was no conflict between the St. Louis, and the Nine Hour claims, but when the St. Louis was surveyed for patent, the easterly boundary line was wrongfully extended over the Nine Hour so as to embrace a portion of the last named claim. Upon application being made in the Land Office, to enter the St. Louis as surveyed, our predecessors in interest, the owners of the Nine Hour claim, filed an adverse claim and thereafter caused suit to be brought thereon in a court of competent jurisdiction, to determine their right to the possession of the area in conflict. Before this action came to trial, the parties compromised; the owner of the St. Louis claim agreeing to patent his claim as surveyed, and in consideration of the Nine Hour dismissing their action in court, and withdrawing their adverse claim in the Land Office, to convey to them the "Compromise ground," being a strip of ground thirty feet in width, the westerly line of which was to be parallel with the easterly side line of the St. Louis claim, between corners numbered two and three

thereof. The parties thereupon entered into a bond in writing, whereby the owner of the St. Louis claim bound himself, his heirs and assigns, to procure as soon as practicable a government patent for his said St. Louis claim, and when such patent was procured, to deed the said ground, describing it by metes and bounds, *together with all the mineral therein contained*, to the obligees named in the said bond, their heirs or assigns (Record 213, p. 36). The predecessors in interest of the Plaintiff in Error thereupon duly performed the conditions upon their part so by them to be kept and performed, by dismissing their said suit, and by withdrawing their said adverse claim in the Land Office. The owner of the St. Louis claim thereupon proceeded to obtain a patent for his claim, but, instead of conveying said Compromise ground to the owners of the Nine Hour, their heirs or assigns, he wrongfully and for the purpose of cheating and defrauding the Plaintiff in Error, who was successor in interest to the obligees named in said bond, conveyed it to the Defendant in Error. The Defendant in Error having refused, on demand being made, to make a deed to the Plaintiff in Error for the Compromise ground, and having full notice of the rights and equities of the Plaintiff in Error, a suit was commenced to enforce the specific performance of the contract, which resulted in the judgment which is pleaded in our answer in this case as an estoppel.

Prior to the determination of the action just named, the Defendant in Error had brought this action against us to recover damages for ores taken and mined by us

out of the Compromise ground, but which was not brought to issue or trial until long after final judgment was obtained in the specific performance case. On a trial of this case to a jury, the Circuit Court held that the plaintiff, Defendant in Error, was entitled to extra-lateral rights on the Drum Lummon lode, although it entered the St. Louis claim and departed therefrom through the same boundary line, to-wit, the east side line; that, in order to show that the same was the east side line of its claim, it was entitled to prove, without alleging it in its complaint, the strike and dip of its discovery vein; that it was entitled to recover of Plaintiff in Error for ores mined and taken from the Compromise ground; that in effect the words "*together with all the mineral therein contained*" found in the bond for a deed, in the judgment of the court in the action for the specific performance of said bond, and in the deed made, executed and delivered in pursuance of such judgment, meant only such minerals as were found in veins, lodes or ledges having their tops or apices within the surface boundaries of such Compromise ground. And the court having committed divers and sundry other errors, the Plaintiff in Error particularly specifies the following upon which it will rely for a reversal of the judgment rendered in this action.

Assignment of Errors.

I.

The Circuit Court erred in overruling the defendant's objection (Record 213, p. 36) to the introduction of any

testimony on the part of the plaintiff, for the reason that the second amended and supplemental complaint, which had theretofore been read to the jury, did not state facts sufficient to constitute a cause of action, and did state facts showing that the plaintiff had no cause of action.

II.

The Circuit Court erred in permitting the witness, William Mayger, to testify that the discovery vein of the St. Louis mining claim ran more parallel with the location of the claim than in any other direction, for the reason that the testimony was irrelevant and immaterial, it not being alleged in the complaint that there was any discovery vein in the St. Louis mining claim, and no allegation therein as to the strike, course or direction in which such vein ran. (Record 213, p. 17.)

III.

The Circuit Court erred in admitting any and all of the testimony offered with reference to the discovery vein of said St. Louis claim, for the reason that the same was irrelevant and immaterial under the pleadings. (Record 213, p. 17.)

IV.

The Circuit Court erred in permitting the witness, James S. Keerl, to testify that the lines representing the planes drawn upon plaintiff's Exhibit No. 1, were drawn parallel to the end lines of the St. Louis claim, for the reason that the same was incompetent and immaterial,

it not having been established by competent proof, which were the end lines or which the side lines of the St. Louis claim. (Record 213, p. 18.)

V.

The Circuit Court erred in permitting the witness, James S. Keerl, to give the dimensions of blocks 8, 9, 10 and 11, which were situated north of the one hundred and eight foot plane, as shown upon plaintiff's Exhibit No. 1, and north of the plane intersecting the easterly boundary line of the St. Louis claim, at the point where the westerly boundary of the Compromise ground intersects it, for the reason that the same was incompetent, irrelevant and immaterial under the pleadings, it being alleged in the complaint that the defendant was the owner of the ground known as the "Compromise ground," "*together with all the mineral therein contained*," and it being alleged in the answer that the said Compromise ground had been conveyed by the plaintiff to the defendant in pursuance of a judgment rendered upon a bond for a deed, which deed conveyed said ground to the defendant, and describing the same by metes and bounds, and including in such conveyance all mineral therein contained, which allegations were not denied by the replication, but were specifically admitted therein, and the judgment roll in said case made a part thereof, wherein and whereby the plaintiff was estopped from claiming any mineral found within said Compromise ground. It plainly appeared from the testimony of the witness, that the mineral about which he was testifying,

was found wholly within the vertical lines of the said Compromise ground.

VI.

The Circuit Court erred in permitting the witness, John R. Parks, to testify that the discovery vein of the St. Louis claim ran generally parallel to the side lines of said claim, for the reason that there was no issue made by the pleadings relative to the discovery vein of said claim, or the course or direction in which the same ran. (Record 213, p. 20.)

VII.

The Circuit Court erred in permitting the witness, John R. Parks, to testify as to the contents and value of Blocks Nos. 8, 9 and 10, for the reason that it appeared by the testimony that said blocks were wholly within the Compromise ground, which, it was admitted by the pleadings was the property of the defendant, together with all the mineral therein contained, and it further appearing by said pleadings that the plaintiff was estopped from claiming said mineral contained in said blocks or any thereof. (Record 213, p. 21.)

VIII.

The Circuit Court erred in permitting the witness, John R. Parks to testify that the four hundred foot level had been used by the defendant in the operation of its mine, for the reason that the same was irrelevant and immaterial, in that this is an action for the recovery of

damages for the alleged extraction and conversion of ores claimed by the plaintiff, and not an action to recover for the use of levels constructed by the defendant upon its own property. (Record 213, p. 22.)

IX.

The Circuit Court erred in permitting the witness, Walter Proctor Jenny, to testify that the discovery point of the St. Louis lode claim, was connected with a vein called the discovery vein, and in permitting the said witness to describe the said vein, for the reason that the same was immaterial and irrelevant, there being no allegations in the complaint with reference to the discovery vein of the St. Louis lode mining claim, and no issue in the pleadings with reference thereto.

X.

The Circuit Court erred in admitting in evidence, in rebuttal, the complaint and exhibits attached thereto, the answer, findings and judgment of the court in the case in the District Court of the First Judicial District of the State of Montana, wherein the Montana Mining Company, Limited, was plaintiff and the plaintiff herein was defendant, for the reason that the same was not in rebuttal of anything proven or offered to be proven on the part of the defendant, and for the further reason that the evidence was not material, there being no ambiguity in either the bond or deed, attached as exhibits to the defendant's answer herein, and therefore there was nothing for the court to construe. (Record 213, pp. 32 to 44.)

XI.

The Circuit Court erred in refusing to give to the jury the following instruction requested by the Plaintiff in Error:

"The parties to this action have by agreement settled the boundary line between their two claims by establishing the western side line of the Compromise ground as such boundary line, and the plaintiff having conveyed by deed the said Compromise ground to the defendant, you are instructed that you cannot find a verdict for the plaintiff for any ores except such as you find were taken out north of a line drawn down from the point of intersection of the westerly boundary line of the Compromise ground, with the easterly boundary of the St. Louis lode, parallel with the end lines of the said St. Louis lode, and lying between said lines, as claimed in the complaint." (Record 213, p. 45.)

XII.

The Circuit Court erred in refusing to give the jury the following instruction:

"The plaintiff having heretofore conveyed to the defendant the strip of ground known as the thirty-foot strip, or Compromise ground, describing the same by metes and bounds, and by such deed having conveyed the same, together with all the mineral therein contained, and it not appearing that such deed was obtained by any fraud practiced by the defendant upon the plaintiff, you are instructed that in and by such deed the plaintiff is

now estopped from claiming any mineral whatever which was or is contained in said Compromise ground, and this without regard to where the lead, in which said mineral has been, is, or may be found, has its apex. The court instructs you that the plaintiff in the action can only recover for such mineral bearing quartz rock and ore as you shall find the defendant has mined, taken and converted to its own use lying east of the east line of the Compromise ground and between the lines mentioned in the complaint, whereat the plaintiff asks to have projected lines drawn down parallel to the end lines of its St. Louis claim." (Record 213, p. 45.)

XIII.

The Circuit Court erred in refusing to give the jury the following instruction:

"If you believe from the testimony in the case that the defendant, though it mined the ore in which the plaintiff has designated as Blocks 8 and 11, has not converted the same, but yet has such ore ready to deliver to said plaintiff, should this court finally decide the plaintiff to be the owner thereof, you cannot include the same or the value thereof in any verdict you may render for the plaintiff. Such ores as are thus held under and subject to the order of this court, have not been converted by the defendant." (Record 213, p. 45.)

XIV.

The Circuit Court erred in refusing to give the jury the following instruction requested by the Plaintiff in Error:

"You are instructed that this is an action for damages occasioned by trespass and the taking and carrying away of ore. To maintain this action the plaintiff must have been in the possession of the premises and the place of trespass at the time of the commencement of this action and at the time of the trial, and the burden of proof was upon the plaintiff to show such possession. The plaintiff has failed to introduce any evidence of such possession except such as arises by operation of law from the possession of the apex of the vein, from which the ore is alleged to have been extracted. This is termed constructive possession. On the other hand, the evidence is clear and uncontradicted that the defendant had, and still has, actual possession of the surface ground from underneath which the ore was extracted by the defendant company, and possession of the place of trespass. Under this state of circumstances the plaintiff is not entitled to recover in this form of action, and your verdict will be for the defendant." (Record 213, p. 46.)

XV.

The Circuit Court erred in refusing to give to the jury the following instruction requested by the Plaintiff in Error:

"You are instructed that in this case the burden of proof is upon the plaintiff to make out by a preponderance of the testimony every fact material to its cause of action. It must not only show that ore has been taken by the defendant, of which it is the owner, but before it can be entitled to recover it must show the market value

of the ore so taken, and in determining the value of the ore so taken you are instructed that the plaintiff is entitled to the value of the ore as it stood in the mine; and in estimating this value you will take into consideration whether or not the ore as it stood in the mine was of sufficient value to pay the cost of extraction and milling and reducing it to bullion in the ordinary method of reducing such ores in the vicinity where the ore was taken; and if from the evidence you find that the ore so taken by the defendant, if you find any was taken, was not of sufficient value to pay the cost of such extraction and reduction, then the plaintiff is not entitled to recover for such ore." (Record 213, p. 46.)

XVI.

The Circuit Court erred in giving the following instruction during its charge to the jury:

"Instruction No. 1.—The evidence in this case shows that the discovery vein of the St. Louis claim extends substantially from one end line to the other lengthwise of the claim; that it dips to the east and that there is another vein having a section of its apex wholly within the St. Louis claim between the planes known as the 520 and 108." (Record 213, p. 47.)

XVII.

The Circuit Court erred in giving the following instruction during its charge to the jury:

"Instruction No. 2.—In estimating damages, if the

jury find that the defendant has prevented the plaintiff from ascertaining the true value of the ore, either by mixing the ore taken from plaintiff's ground with ore belonging to the defendant, or with any other material taken from any other place, then the jury are at liberty to consider the highest value of ore found in the vicinity of that ore." (Record 213, p. 47.)

XVIII.

The Honorable, the Circuit Court of Appeals within and for the Ninth Circuit, erred in affirming the judgment rendered in the United States Circuit Court for the Ninth Circuit, within and for the District of Montana, in said action, and in its refusal to reverse and set the same aside, because of some one or more or all of the errors hereinbefore specified.

XIX.

The Circuit Court of Appeals erred in refusing to give full faith and credit to the judgment in the District Court of the State of Montana in the Specific Performance case, as the same appears in the transcript herein on page 32 *et seq.*, and in refusing to hold that the Defendant in Error was not estopped and enjoined, in and by such judgment, from claiming any mineral found in the said thirty-foot strip or Compromise ground.

XX.

The said Circuit Court of Appeals erred in holding that the plaintiff was entitled to follow the vein on its

dip so long as any part of the apex of the vein was found within its St. Louis claim; in other words, that it was entitled to follow the vein on its dip to what it has termed its "133 foot plane." (Record 214, p. 50.)

Argument.

THE COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

The defendant, plaintiff in error here, at the beginning of the trial, after the jury had been sworn, but before any evidence had been offered by the plaintiff, objected to the introduction of any testimony whatever on the part of the plaintiff, for the reason that the second amended and supplemental complaint, which had theretofore been read to the jury, did not state facts sufficient to constitute a cause of action, and did state facts which showed that plaintiff had no cause of action. (Record 213, p. 16.) The Circuit Court of Appeals seems to be of opinion (Record 213, p. 65) that this objection should have been raised by motion or demurrer, at some previous stage of the case, and that by not so raising it we have waived it. Under the provisions of the Code of Civil Procedure of the State of Montana an objection to the complaint, that it does not state facts sufficient to constitute a cause of action, or one going to the jurisdiction of the court, is never waived (*Mont. C. C. P.*, sec. 685), and may be raised at any stage of the case. That an objection upon either of these grounds could not be waived

by a failure to demur, and might be urged at any time, even in an appellate court, was early set at rest in this state.

Territory v. Virginia Road Co., 2 Mont., 96.
Gillette v. Hibbard, 3 Mont., 413.
Foster v. Wilson, 5 Mont., 53.
Quirk v. Clark, 8 Mont., 231.

The doctrine of these decisions is so universally the law, that we doubt if a single case can be found which conflicts with them.

We have set out the allegations of the complaint very fully in our statement of the case herein. It avers that the plaintiff is the owner of the St. Louis mining claim, describing it by metes and bounds, at great length, and with unnecessary particularity, and "of the quartz rock and ore and precious metals contained in any and all veins, lodes and ledges, or mineral-bearing rock through their entire depth, the tops or apices of which lie within the surface lines" of the same. In subdivision four of its complaint, it alleges that one of the veins having a portion of its top or apex within the surface boundaries of the St. Louis claim, enters the same through the east side line, and after traversing the said claim for a given distance, departs out of the claim through the same side line; that it dips to the east and under the Nine Hour claim including the Compromise ground; that it is entitled to have lines drawn down, at the point where such lode enters, and at the point where it departs from its said St. Louis claim parallel to the end lines of its claim,

marking the northerly and southerly boundaries of the plane within which it alleges it has the right to follow the vein on its dip extra-laterally and under the Nine Hour claim. For some reason which we have never had given us, the pleader has designated two points at the southerly end, through which this line should be drawn down, one at the point where the hanging wall of the vein crosses the westerly boundary of the Compromise ground, and the other at the point where the foot wall of the vein crosses the same line, which he has designated respectively his "108 foot plane" and his "133 foot plane." Out of this lode and within the plane aforesaid, it is alleged that the defendant has extracted and converted to its own use, mineral to the value of two hundred and fifty thousand dollars. These allegations are all squarely denied by the answer, and every material fact alleged in this subdivision of the complaint is put in issue. Remembering now, that extra-lateral rights for this vein are being asserted in what is confessed to be our ground, where every presumption and intendment of the law is in our favor, let us inquire what the plaintiff is required to prove. Manifestly it is, that the lines which it has denominated its side lines, and its end lines are in truth and in fact what it has thus called them. And how is this to be shown? By showing which of these lines is crossed by its discovery vein on its course through the claim. The end lines are not those lines which the locator has called such in the location of his claim, but they are such as are actually crossed by the discovered vein on its strike.

Flagstaff Mining Co. v. Tarbet, 98 U. S., 463, 468.
Iron Silver M. Co. v. Elgin M. Co., 118 U. S., 196.
Argentine M. Co. v. Terrible M. Co., 122 U. S., 478.
King v. Amy & Silversmith M. Co., 152 U. S., 222.
Del Monte M. Co. v. Last Chance M. Co., 171 U. S., 57.
Walrath M. Co. v. Champion M. Co., *ibid*, 293, 307.

Upon this question, nothing clearer or more explicit is to be found, than in the case last cited.

Mr. Justice McKENNA, speaking for the court, after referring with approval to what Mr. Justice BREWER has said in the Del Monte case, *supra*, relative to the location made on the surface controlling rights under the surface, and that whether a given line was in fact an end line or a side line, depended, not upon what it was called by the locator, but upon the course or strike of the lode through the claim, he says:

"These propositions we affirm, with the addition that the end lines of the original vein shall be the end lines of all the veins found within the surface boundaries."

A recent case, decided by a Judge who has a very wide experience in the determination of these questions, is that of *Cosmopolitan Mining Company v. Foote*, 101 Fed. Rep., 518.

Says HAWLEY, *J.*, in this case, page 521:

"The defendants' contention seems to be that because they claim they have subsequently discovered the apex of a lode running northerly and southerly, at the easterly line of their surface location, they have a right to follow the lode on its dip

underneath the Cosmopolitan claim, without regard to the direction or course of the lode located by Foote. But that right, in law, depends upon the fact whether what are marked on the ground as the side lines of the location are in fact the side lines; and to determine that question we must look exclusively to the location and find out what the defendant Foote located; because, if he located on a lode that he thought had a northerly or southerly course, and made his location accordingly, and the subsequent developments proved that the locator was mistaken in the course of the lode, he would be bound by his own mistake, and governed and controlled in his right by the facts as they are shown to exist, instead of what he thought existed at the time the location was made."

In this case, the Cosmopolitan case, the court found from the testimony that the discovery lode ran more nearly in an east and west direction through this claim, than it did in a north and south direction, and for this reason refused to give the defendant extra-lateral rights under the Cosmopolitan surface.

But it is alleged in the complaint that the St. Louis is a patented claim, and this fact raises certain conclusive presumptions, among which is, that there was a valid *bona fide* discovery within its boundaries, of quartz, or other rock in place, carrying some one or more of the metals named in the Mineral Land Act.

Calhoun G. M. Co. v. Ajax G. M. Co., 182 U. S., 499
Carson G. & S. M. Co. v. North Star M. Co., 83 Fed., 658, and cases there cited.

But, in no case yet decided, has it been held that a patent to a mining claim raises a legal presumption that

the vein or lode, on its strike, passes through the claim from end to end as staked out on the ground by the original locator, or that the discovery vein runs in any particular direction, or that it is continuous from end to end of the claim; or that its dip is in any given direction. Where, as in the case at bar, rights in other veins found within the exterior boundaries of a mining claim, are dependent upon the rights secured in the discovery vein by the location, these are matter of allegation and proof, unaided by any legal presumption whatever. A complaint which claims rights upon a by, or accidental vein, found within the surface boundaries of a mining claim, which is silent as to the rights acquired upon the discovery vein by the location thereof, does not state material facts which the plaintiff must show to entitle him to recover, and does not state facts sufficient to constitute a cause of action.

IV.

THE COMPLAINT SHOWS THAT PLAINTIFF HAS NO CAUSE OF ACTION.

As we have already seen, the plaintiff alleges that plaintiff is the owner of, and in the possession of the St. Louis claim, as the same was originally surveyed for patent, "*save and except* that portion thereof known as the 'thirty-foot strip' or 'compromise ground,' which belongs to and is a portion of what is known and designated as the Nine Hour Lode mining claim, which said fractional portion of said St. Louis Lode mining claim is

described as follows, to-wit: *(Here follows description of Compromise ground by metes and bounds)* including an area of about 12844.50 square feet, together with all the mineral therein contained." (Record 213, p. 3.)

Here then, is a clear positive allegation that the plaintiff is the owner of all the St. Louis claim as originally surveyed for patent, and of all mineral contained therein, *except* the portion thereof designated as the Compromise ground, and the mineral therein contained, which it does not own.

The third paragraph of the complaint (Record 213, p. 3) proceeds to inform us as to who is the owner of the Compromise ground to which it has just disclaimed ownership.

"That the said defendant Montana Mining Company, Limited, is and was the owner of what is known and designated as the Nine Hour Quartz Lode Mining Claim, situate and being east of the said St. Louis Lode Mining Claim, and including the 30-foot strip or Compromise ground aforesaid."

This is as plain an allegation that the plaintiff *did not* own, was not in the possession, nor entitled to the *possession*, of the so-called "Compromise ground," nor *of the mineral therein contained*, and that the defendant was the owner of the same, as the wit of man could devise. And yet every pound of ore for which the plaintiff was suing to recover laid in this same Compromise ground. In this connection it is to be borne in mind, that this is an allegation of fact in a verified pleading, and is not the mere recital of the language used in the bond, the judgment,

or the deed made in pursuance of the judgment, and as a part of it.

And in the complaint there is nowhere to be found an allegation that the plaintiff is the owner of the mineral found in the Compromise ground, and for the extraction of which it has judgment in this action. In paragraphs 4 and 5 of the complaint (Record 213, pp. 3 and 4) there is a claim to recover damages for ores mined from a vein having a portion of its top or apex inside the surface boundaries of the St. Louis claim, which vein, on its dip, passes under and beneath the "Compromise ground," but there is no allegation contained in either of these paragraphs, or elsewhere in plaintiff's pleadings, that it is the owner of this vein, or of the mineral contained in it, or in the "Compromise ground."

In saying this, we do not overlook the allegation found in the beginning of the second paragraph of the complaint, that the plaintiff is the owner of the St. Louis Lode Mining Claim, and of the quartz rock and ore and precious metals, contained in any and all veins, lodes and ledges of mineral bearing rock, through their entire depth, the tops or apices of which, lie within the surface lines of its claim. This allegation relates, by the very terms used, only to lodes having their *entire* apices within the surface boundaries of the claim, and not to a lode, which it is alleged has only a portion of its apex within the surface boundaries of the claim. Then again, from this allegation of ownership of quartz rock and ore claimed in veins having their apices within the surface

boundaries of the St. Louis claim, we have expressly excepted therefrom, in the same paragraph, the Compromise ground and all mineral contained therein.

In the absence of all allegation of ownership of the mineral in the "Compromise ground," or of anything that can be tortured into such allegation, there is not much room for construction. But if there were, while the allegations of a pleading are always to be fairly construed, it is a familiar rule, that where there is an ambiguity in the language used, fairly admitting of two constructions, it is to be construed most strongly against the pleader. There is no precedent for holding that a plaintiff does not intend, or mean exactly what he says, when he employs plain and unambiguous language to define what he claims and disclaims.

V.

A VEIN OR LODE WHICH ENTERS AND DEPARTS THROUGH THE SAME SIDE LINE OF A CLAIM, HAS NO EXTRA-LATERAL RIGHTS.

We have already discussed the question quite fully in our brief on the motions to dismiss and affirm, and we have only a suggestion or two to add to what is there said.

In considering the question of the sufficiency of the complaint, this Court will regard it from the standpoint of the Circuit Court, when our objection was made to the introduction of any testimony whatever on the part of the plaintiff, because its complaint did not state a cause

of action. It will be remembered that when our objection was made, not only was the complaint entirely silent upon the question of there being a discovery vein within the surface boundaries of the St. Louis claim, but no word of testimony had then been given regarding the discovery vein, its strike or dip. The Circuit Court had then to deal with a mining claim, which so far as the allegations of the complaint showed had but a single vein in it, and that entered and departed through the same boundary line. There was nothing alleged in the complaint by which the court could determine whether the line that was thus crossed by the apex of the lead was a side line, or an end line of the claim, and extra-lateral rights in an easterly direction are claimed for this vein. Can there be any doubt about the proposition that such a complaint not only does not state facts sufficient to constitute a cause of action, but does state facts showing that the plaintiff has no cause of action? It alleges, in effect, that the same line constitutes the end line of both ends of the only vein shown by the complaint to be within the surface boundaries of its claim. It might be said to be a double end line, in, that the same line terminates plaintiff's rights at both the northerly and southerly end of its apex; but at all events, and with no showing to the contrary, it is an end line in the fullest sense of the term, and partakes of all of the qualities incident to an end line. Can anything be clearer than that by the provisions of *U. S. Rev. Stats.*, sec. 2322, an end line absolutely terminates the right to pursue a vein, and that too without regard to whether such pursuit is on the strike

or the dip? If this vein ran parallel to an actual end line of the claim and so close to it as to dip under it, in its downward course into the earth, it could not be contended that the vein could be pursued on its dip beyond such end lines.

Parallelism of the end lines is essential to the existence of extra-lateral rights.

Iron S. M. Co. v. Elgin M. Co., 118 U. S., 196.
Montana M. Co. v. Clark, 42 Fed., 628.
Tyler M. Co. v. Sweeney, 54 Fed., 284.

Where a vein, as in the case at bar, enters and departs through the same line, there can be nothing to define the plane within which the vein can be pursued, and hence when this occurs the miner must content himself with what he finds within his own surface boundaries, and cannot pursue it into the territory of his neighbor.

VI.

WHEN AN APEX OF CONSIDERABLE WIDTH CROSSES A SIDE LINE AT AN ACUTE ANGLE, WHERE SHALL THE BOUNDARY PLANE BE DRAWN?

This is the question presented by the record in case No. 214. The subject was touched upon in our brief in response to the motion to dismiss. And if the Court should deny the motion, we present the following in addition to the discussion therein contained.

The question here raised, as applied to the case of a vein departing from the side line of a claim at an angle,

seems to be one of first impression, as in no reported case has it been raised and actually passed upon. The nearest approach to it is the Black Rock-Niagara case, reported under the title of *Fitzgerald v. Clark*, 17 Mont., 100.

The second assignment of error in the Supreme Court of Montana in that case was as follows:

"The Court instructs the jury that if the whole of the apex of the Niagara vein or lode appears at any point within the surface location of the Niagara claim, then the respondent had the right to follow it on its dip beneath the surface of the Black Rock claim."

In that case the apex of the vein crossed the southern side line of the Niagara at a sharp angle, and while nothing is said as to the width of the lode, it must have been of some width leaving a wedge-shaped piece or portion of the apex inside the Niagara ground before the entire apex was within the surface boundaries of that claim; and yet the court instructed that it was only entitled to extra-lateral rights on the dip of the vein where the whole apex was within its surface boundaries. And the jury found that the apex of the vein in controversy passed entirely within the lines of the Niagara lode. 17 Mont., 103. Exceptions were not properly saved to the instructions, but the Supreme Court considered them on objections to the insufficiency of the pleadings, and the judgment of the court below was affirmed. The case was carried on writ of error to the Supreme Court of the United States, where it was again affirmed.

Fitzgerald v. Clark, 172 U. S., 92.

Counsel for Defendant in Error relied upon the case of *Bullion, Beck & Champion Mining Co. v. Eureka Hill Mining Co.*, 5 Utah, 3; 11 Pac., 515. That case involved a controversy over what has been termed a "split" vein, or a vein whose apex was so wide that the surface lines of the claim did not cover the entire apex of the vein; or in other words, the apex was bisected on its strike by the side line. But even as thus explained the case has not been accepted as authority. It was decided by a divided court, and Mr. Lindley, in his work on Mines, sec. 583, discusses the question at considerable length, and maintains the proposition that the entire width of the apex must be included in the location in order to give extra-lateral rights on the dip. In support of this contention he cites the opinion of Judge HALLETT and of Mr. Justice MILLER, as expressed in the case of *Hall v. Equator Mining Co.*, 11 Fed. Cas., No. 5931. So, too, Mr. MORRISON in his work says:

"The holding in the Equator case, as far as we know, has been uniformly followed by the *nisi prius* courts, and we cannot doubt that it is a correct application of the statute to the subject matter."

Morrison's Mining Rights, p. 112.

And Messrs. BARRINGER & ADAMS, speaking of the Utah case, says:

"And it has been held in Utah that this ownership extends to the entire width of the vein, even where the width of the apex is such as to extend beyond the side lines of the claim. It is hardly to be supposed that this will be followed elsewhere."

Barringer & Adams on Mines and Mining, p. 442.

And Judge KNOWLES, who tried the case at bar, speaking for the Court in the case of *Waterloo Mining Co. v. Doe*, 82 Fed., 45, says:

"The fact that a part of the apex might be in the ground granted would not give any right to that part of the apex which is not therein, although the apex might be cut by both end lines of the granted premises. There is no case that supports this doctrine. The case of Bullion, Beck & Champion Mining Company v. Eureka Hill Mining Company, 5 Utah, 3; 11 Pac., 515, is a case where the croppings were cut on the strike of the same by a side line of a location."

The case of *Colorado Central Consolidated Mining Company v. Turck*, 50 Fed., 889; 54 Fed., 262, again presented the question of a split or forked vein, and the Circuit Court of Appeals for the Eighth Circuit there established the rule that the senior location could only follow the vein to the extent of its outcrop, whether it be the outcrop of a broad vein or a forked vein; that when the outcrop passed on to the adjoining claim, that belonged to the owner of the latter claim, though the latter was a junior location. It will be noticed that in that case the controversy related to the bisection of a vein or fork by a side line, and the ores were extracted from a vein whose apex was clearly without the Colorado Central lines. So that the Bullion Beck case has not only been discredited by the text writers, but it has been distinctly repudiated by the Federal courts of both the Eighth and Ninth Circuits.

But in the present case what is spoken of as the side line of the St. Louis mining claim is an end line in so

far as it affects the rights of the Defendant in Error to the Drum Lummon vein at the points in controversy. The side line of the St. Louis mining claim crosses the strike of the vein and cuts off the right of the Defendant in Error to follow the vein on its dip. There would seem to be no question but that this would be true, if it were the located vein with which we were dealing. This proposition is iterated and reiterated in every side-end line case from the Flagstaff case in the 98th U. S. Rep. to the Walrath case in 171 U. S. Rep. No proposition of mining law can be said to be better established. If it would be true with reference to the located vein, no reason can be urged why it should not be true with reference to the accidental veins found within the claimant's surface boundaries. The citations of counsel to the effect that the end lines of the claim as located, are the end lines of this accidental vein for all purposes, do not support their contention. They merely hold that the end lines of the located claim determine the direction of the planes bounding the limits of all other veins within the location, and fix points and directions beyond which the locator cannot go in the exploration of every other vein found within his surface location. They do not hold, in cases where the accidental vein pursues different directions of course or dip, and departs from the surface side lines of the claim at different angles, that the extra-lateral rights of the claimant must be extended to the end line planes as located; in other words, the located end lines are boundaries of limits beyond which the locator cannot go. The extra-lateral rights, if any, which at-

tach to accidental veins, are to be determined within these planes by reference to the direction of the particular accidental vein. And, as in the case at bar, where the accidental vein enters and departs from the same side line, if such accidental vein is entitled to extra-lateral rights at all, they are cut off whenever and wherever the accidental vein on its strike begins to depart from the side line, for the reason that as to that particular vein at that point, the side line becomes an end line. This is clearly shown by the language of Mr. Justice McKENNA in the case of *Walrath v. Champion Mining Company*, 171 U. S., 293, 307.

"This Court in Del Monte Mining Co. v. Last Chance Mining Co., decided at the present term, ante, 55, reviewed the cases we have cited, and speaking for the court, Mr. Justice BREWER said:

"'Our conclusion may be summed up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface; second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike; third, every vein the top or apex of which lies inside of such surface lines extended downward vertically, becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor; fourth, the only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed, that, in fact, the location has been placed not along, but across the course of the vein. In such case, the law declares that those which he called end lines are in fact side lines, and

this, upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location. Our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular.' Mining Company v. Tarbet, U. S., 463-468.

"These propositions we affirm, with the addition that the end lines of the original veins shall be the end lines of all the veins found within the surface boundaries."

It is apparent that the term "end lines" as used in this last sentence is used in the same sense as it was used by Mr. Justice BREWER in the Del Monte case. These "end lines" serve two purposes, the one being the fixing of the direction of the bounding planes, the other the termination of the right of the locator to pursue the vein on its dip beyond his surface lines. And it will be noted that the exception mentioned by Mr. Justice BREWER is the latter purpose. In other words the "end lines" which fix the direction of the bounding planes are always the surface or actual "end lines." The "end lines" which terminate the locator's right to follow the vein are the lines cutting the course of the vein, and are fixed by the court from the evidence at the trial. In the former sense only can it be said that the "end lines of the original veins shall be the end lines of all the veins found within the surface boundaries."

The distinction between the several functions or purposes of end lines here contended for was pointed out by

Mr. Justice DEWITT in *King v. Amy & Silversmith Con. Min. Co.*, 9 Mont., 575, in the following language:

"The law intends that the plane of the end line shall operate as a boundary to the dip, and so operate at the point where the strike is ended. If the strike reached the original end line, as in a regular location, the bounding plane would there operate upon the dip. If the strike, by reason of its going out of a side line, falls short of reaching the original end line plane, that plane must take effect where the strike in fact ends; that is, at a point on the side line (point e, Fig. 1); and, if it takes effect there, its parallelism must not be destroyed. We therefore have the bounding plane operating at the point where the apex leaves the north side line, and operating parallel to the east side line, and retaining its parallelism as originally marked on the ground. It is not a new line or plane, or one judicially constructed. It is determined by the location lines on the surface. There is never any re-adjustment according to developments. The parallelism of the end line planes is fixed by location, and never varies. The point of departure of the strike from the surface lines fixes the point where the end line plane is to perform its functions, whether that departure be at an end line, as contemplated by the statute, or whether accident has fixed it at a point on a side line."

The principle thus announced was correct, although it was not applicable to the facts in the Amy Silversmith case. In that case the lode on its strike crossed both side lines of the claim, and consequently the lines which the locator had designated as end lines were in fact side line. The case, in this respect, was like the Flagstaff case, and this Court was obliged to reverse the decision of the Supreme Court of Montana for this reason. Says Mr. Justice FIELD, speaking for the Court:

"The Amy claim had no lateral right by virtue of the extension of the vein through what was called the north side of its claim, as that side line so called was, in fact, one of its end lines."

King v. Amy & Silversmith M. Co., 152 U. S., 222-229.

The lead, on its strike, also crossed the south side line, so called, of the claim, and that was therefore also an end line. If any projected end lines were to be drawn down in this case, they must have been drawn down parallel to these two, so called, side lines, and if these two side lines were not parallel to each other then no projected end lines could be drawn down, and there would be no alternative except to deny to the claim all extra-lateral rights.

When the lode on its strike crosses an end line, and a side line of the claim, then a different condition arises and the doctrine quoted above from the Amy Silversmith case in the Supreme Court of Montana becomes applicable as is shown by

Del Monte M. Co. v. Last Chance M. Co., 171 U.S., 55.

Clark v. Fitzgerald, *idem*, 92.

The question at issue here is not whether a locator is entitled to any extra-lateral rights upon a vein whose apex is partly within the surface lines, which was the question involved in the Bullion-Beck and Turck cases. But the controversy is as to the point at which the plane terminating the locator's rights shall be drawn.

Whether the Defendant in Error is to have any extra-lateral rights upon the Drum Lummon vein will be determined by the decision in case No. 213. The extent of those extra-lateral rights is here involved. And we contend that the side line of the St. Louis mining claim at the point where it cuts the hanging wall of the Drum Lummon vein becomes an "end line" for the purpose of fixing the point at which the bounding plane, parallel to the located end line, must be drawn, and that beyond that plane the Defendant in Error has no right to pursue the vein on its dip, because it has crossed its end line. So that we contend that the trial court was not in error in holding, as it did, that the plaintiff must show itself entitled to the whole of the apex at the point in controversy, in order to entitle it to pursue the vein on its dip.

VII.

ADMISSION OF IRRELEVANT TESTIMONY.

About the first thing the plaintiff proceeded to do on the trial of this case, was to offer proof of the strike and dip of what it was pleased to term its Discovery vein (Record 213, pp. 17, 20, 21, 23), to which Plaintiff in Error objected, for the reason that the same was incompetent and immaterial, there being no allegation in the complaint as to the course or direction of the discovery vein, nor any allegation that there was a discovery vein, and the admission of this evidence forms the basis of our second, third, fourth, sixth and ninth assignments

of error. It is to be remembered in this connection, that this is a common law action for the recovery of damages for an alleged trespass, and that with reference to the procedure on the trial of the cause the Code of Civil Procedure of the State of Montana governed. It is expressly declared, by section 3144 of that Code, that

"Evidence must correspond with the substance of the material allegations and be relevant to the question in dispute."

No material facts not pleaded can be proved.

Bank v. Smith, 11 Wheat., 171; 6 L. Ed., 443.
Stout v. Coffin, 28 Cal., 67.
Murdock v. Clark, 59 Cal., 683.
Rector v. Clark, 78 N. Y., 21-28.

Was it material in the trial of this case for the plaintiff to establish the fact, that there was within the surface boundaries of its St. Louis claim, a vein, lode or ledge upon which its discovery was made, and the strike and dip of such vein? This question finds its answer in the sentence already quoted from the Walrath case.

"This proposition we affirm, with the addition that the end lines of the original *(i. e. Discovery)* vein shall be the end lines of all the veins found within the surface boundaries."

Walrath v. Champion M. Co., 171 U. S., 293-308.

And this enunciation is settled law, not only by the case in which it is found, but in every side-end-line case to be found in the books.

"The purpose of the rule which requires that the allegations and the proof must correspond, is that the opposite party may be fairly apprised of the specific nature of the questions involved in the issue."

Nash v. Towne, 5 Wall., 689-698.

Here we were not apprised of the nature of the questions the plaintiff expected to present on the trial of his case. By its complaint, we were invited into court to determine the rights as to one specific vein, and nothing whatever was said as to there being any other vein or lode, within the surface boundaries of its claim. And this variance between the allegations of its complaint, and the proof, was material and of a character to mislead us, in maintaining our defense on the merits. If the plaintiff had alleged in its complaint that its discovery vein run in a northerly and southerly direction through its claim, and that its dip was to the east, we might have denied those allegations, and, if, upon the trial, we had succeeded in showing, as we think we could have done, that its true discovery vein did not run in a northerly and southerly direction or did not dip to the east, but in some other direction, it would have been a complete defense to the case. Not being apprised of the fact, by allegations in its complaint to that effect, we were taken by surprise, and were wholly unprepared with proof to meet the issue thus unexpectedly tendered to us.

The proposition that the proof and the pleading must correspond, and that any material variance is fatal, seems so well settled that it is scarcely necessary to cite authorities, but we will refer the Court to the following,

should it find it necessary to refer to them in passing upon this question.

Boone v. Chiles, 10 Pet., 177, 209.
Rubber Co. v. Goodyear, 9 Wall., 793.
Singleton v. Scott, 11 Iowa, 594.
Boardman v. Griffin, 52 Ind., 101.
Stroup v. State, 70 Ind., 495.
Arnold v. Angell, 62 N. Y., 508.
Vrooman v. Jackson, 6 Hun, 326.

The Defendant in Error contended in the courts below, and will doubtless contend in this Court, that inasmuch as it has alleged in its complaint that it is the "owner" of the St. Louis claim, it had the right to show such ownership by any competent proof. A sufficient answer to this contention is that the plaintiff's title to the St. Louis claim is expressly admitted by the first paragraph in our answer, and no testimony to establish it was necessary.

It further contends here (see p. 12 of its brief on motions, Record 213) that having pleaded that it was the owner of the vein in question, it would be pleading evidence if it were required to plead that it had a discovery vein extending lengthwise through its claim, and that the dip of such vein was to the east. It says:

"The plaintiff contended that the simple allegation of ownership was sufficient. That was a question of the construction of a practice act of the State of Montana, nothing else. What form the complaint takes in an action of ejectment, depends entirely upon the law of the states, the United States Court simply following the state practice."

We do not think that the gentlemen on the other side, intend by this, to be understood as saying that there is any special provision in the Code of Civil Procedure of the State of Montana, or elsewhere in the statutes of that state, specially authorizing a plaintiff in an ejectment suit to simply allege ownership of the real property in controversy, in his complaint, and saying that such allegation shall be sufficient. There certainly is no such statute to be found in the laws of the state, and there never was one. By this we mean such a provision as is found in the Code of New York, whereby it is declared that it shall be sufficient for the plaintiff to aver in his declaration *(complaint)* that on some day therein to be specified, and which must be after his title accrued, he was possessed of the premises in question, describing them with convenient certainty, etc. In Montana, as already said, there is no special provision for pleadings in actions for the possession of real property, but they are to be governed by the general principles of pleading. The plaintiff may, if he elect, deraign his title, or he may allege that on a given date he was the owner of, and in possession and entitled to the possession of, the property in dispute, and it has been held in this state, following *Payne v. Treadwell*, 16 Cal., 221, and *Lick v. Diaz*, 30 Cal., 65, that a complaint in the latter form was good.

But this rule is applicable only to actions in ejectment, and is not applicable to other actions where an element in the right of recovery is the title of the plaintiff to certain real property. Of course, in trespass *quare clausum*, possession is all that is necessary to maintain an action

against a mere naked trespasser, and title to the property is not essential. But take a case, for example, where the plaintiff has replevined cattle *damage feasant*, the defendant who would justify the seizure of another's property, must plead every fact that would authorize it. He must set forth his title fully, and a bare averment of title, with possession or right of possession, is not sufficient.

3 *Chitty's Pleadings*, 1058, notes f and g and authorities there cited.

In this connection, we desire to call the attention of the Court to the fact that in New York, Wisconsin, Indiana, South Carolina, Florida, Oregon, Minnesota, and perhaps some other states, this obligation to plead title is modified by statute providing, that in an action to recover possession of property distrained doing damage, an answer that the defendant, or person, by whose command he acted, was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good, without setting forth the title to such real property. See:

Code Proc. N. Y. (10 Rev. ed.), § 166.
Rev. Stats. Wisconsin, Chap. 125, § 28.
Code Civ. Proc. Ind., § 89.
Code Proc. S. C., § 189.
Code Civ. Proc. Fla., 116.
Code Civ. Proc. Ore., § 90.
Code Civ. Pro. Minn., § 102.

There is no such provision in the statutes of Montana, and in the absence of any enactment, the common law is, by statute, declared to be the rule of decision.

In an action by an heir to enforce a forfeiture stipulated in a conveyance by an ancestor, for the non-performance of a condition subsequent, the complaint must not only show the heirship, and the fact of the conveyance and its condition, but also that the ancestor was the owner in fee at the time.

Clark v. Holton, 57 Ind., 564.

We think the reason for the rule for which we contend, is more cogent in a case like the one at bar, than it is in the cases above cited, where it is so rigidly enforced. It is admitted by the complaint, paragraph three, that our Nine Hour claim is a patented claim. The plaintiff is seeking to assert rights within the vertical boundaries of our claim. We are therefore entitled to say to him, in the language of Judge HAWLEY:

"Hands off, of any and everything, within my surface lines, extending downward vertically, until you prove you are working upon or following a vein which has its apex within your surface claim.

Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed., 540, on p. 550.

And, as we have already seen, he must show more than this. He must show that his discovery vein has extra-lateral rights in the same direction and to the same extent, which he is claiming for the additional or by-vein

which he finds within his surface boundaries. As showing the legal presumptions which attach to a patented mining claim, and the *onus probandi* which rests upon him who asserts rights within such ground, we beg to call the Court's attention to the following cases:

Reynolds v. Iron Silver M. Co., 116 U. S., 987.
Cheeseman v. Hart, 52 Fed., 98.
Duggan v. Davey, 4 Dak., 110.
Jones v. Prescott M. F. Co., 21 Nev., 339, 349.
Bell v. Skillicorn, 6 New Mex., 399.
Leadville M. Co. v. Fitzgerald, 4 Morr. Mine. Rep., 380.
Doe v. Waterloo M. Co., 54 Fed., 935.

The necessity for enforcing this rule is well illustrated by the case at bar. What purports to be a map of their St. Louis claim appears on the front page of their brief in their motion to dismiss, in case 213. The apex of what is claimed to be the discovery vein, is shown by the irregular red line, drawn across it from north to south. By reference to it, you will see that for more than two hundred feet, it runs in an almost due easterly and westerly direction, so that if it is continuous in that direction, it would cross the line which plaintiff has denominated its east side line, and that line would become, under the decisions, an end line of its claim. Now if we can show, as we feel confident we can, that plaintiff's discovery was upon the east and west vein; that it continues in substantially the same direction as shown on their plat, and does actually cross the east line of their claim; that

what they have followed to the north and south of this vein, are mere fault planes or slipping seams in the country rock, and not a vein at all, ought we not to have some reasonable opportunity of doing so? Is it our duty to import these important matters into the case for the first time by our answer, or must the plaintiff when he claims rights within our patented surface, show his right to them, not only by proof, but by appropriate pleading?

VII.

EVIDENCE IN AGGRAVATION OF DAMAGES.

Our eighth assignment of error relates to the testimony which was given by the witness John R. Parks (Record 213, p. 22) relative to the use made by the Plaintiff in Error, of the 400 foot level, shown upon plaintiff's "Exhibit A," which level had been constructed within the surface boundaries of the Nine Hour claim, conceded by the pleadings to be the property of the Plaintiff in Error, but within that portion of the lead, which the plaintiff claimed had its apex in the St. Louis claim. The court, over our objection, allowed the witness to testify to the use the Plaintiff in Error had made of the level in question.

The whole scope of plaintiff's action was for the recovery of damages for ores alleged to have been wrongfully mined by the Plaintiff in Error, from the Compromise ground, and no claim was made in the complaint for any sum whatever, for the use and occupation of the

St. Louis mining claim, or any part or portion thereof. This testimony was offered for the purpose of augmenting plaintiff's damages, and it doubtless had the desired effect, and it was in our judgment prejudical error. Evidence in aggravation of damages cannot be received in an action of trespass, unless there is an allegation of the facts sought to be proved, either as a matter of aggravation, or as a distinct ground of recovery.

Eames v. Prentice, 8 Cush., 337.
Warner v. Abbey, 112 Mass., 355.
Brown v. Lake, 29 Ohio St., 64.
McTavish v. Carroll, 13 Md., 429.

VIII.

THE JUDGMENT ROLL IN THE SPECIFIC PERFORMANCE CASE WAS INADMISSIBLE ON REBUTTAL.

For some reason, which we have never been able to fathom, the plaintiff on the trial of this case, was very anxious to have introduced in evidence, in its behalf, the judgment roll in the Specific Performance case. It first offered it in evidence in making out its case in chief, and upon the settlement of our bill of exceptions, it insisted on amending our bill so as to make it show this unimportant fact (Record 213, p. 19). The question propounded to the witness Mayger as to the circumstances under which he executed the deed to the Compromise ground (Record 213, p. 18) was for the pur-

pose of introducing this judgment roll and it was then offered in evidence. It was, however, so manifestly out of place, and the question asked of the witness, as to the circumstances under which he executed the deed, was so manifestly irrelevant and incompetent that the court sustained our objection to its introduction in evidence. In the argument with reference to its admissibility, we had suggested that if it was admissible at all, it would be in rebuttal, and accordingly it came in on rebuttal, over our objection (Record 213, p. 44). It was not claimed, at the time of its introduction, or at any other time, that it was in rebuttal of anything we had proved or offered to prove, but it was admitted to enable the court to construe the deed marked Plaintiff's Exhibit No. 2 (Record 213, pp. 45-10). The deed thus sought to be construed, was the deed made in pursuance to the judgment in the Specific Performance case, to the Plaintiff in Error, for the "Compromise ground," and needed no construction whatever. There was no controversy about its terms—no dispute between the parties as to the making or execution thereof, nor as to what was conveyed thereby, and in short there was not an ambiguous expression in it, for the court to construe. It was before the court at the beginning of the case as an Exhibit to our answer, and the court had repeatedly construed it in its rulings made upon our objections to the admission of testimony. The court had already determined, and had repeatedly determined during the progress of the trial that the words "*together with all the mineral therein contained*," found in the description of the property con-

veyed by said deed, was an absolutely meaningless expression, adding nothing to or taking nothing away from the deed.

If the original bond for a deed had not been merged in the judgment, and had been before the court as an estoppel, the court might have permitted testimony to be given, tending to show the situation of the parties and the surrounding circumstances, to ascertain, if possible, what was the intention of the parties, if there was any ambiguity, either patent or latent, upon the face of the instrument. As we have already shown in our brief on the motions to dismiss and affirm, the intention of the parties to this bond was a matter expressly in issue in the Specific Performance case, and the judgment of the State District Court was conclusive upon this subject. The intention of the parties at the date of the execution of the deed, was wholly immaterial. The plaintiff could not have had any intention in its execution which could be the subject of judicial inquiry. As shown by the defense it made in the Specific Performance case its intention was not to execute a deed at all, if it could avoid doing so. It was compelled to execute the deed by the order of the court, and it was compelled to execute the deed which was prescribed by the court and none other. There is no view of this case which would render this testimony admissible, anywhere in the case, and least of all on rebuttal. It was therefore clearly error to admit it, although we cannot claim that it was prejudicial.

IX.

THE PLAINTIFF WAS NOT ENTITLED TO RECOVER IN THIS ACTION, FOR THE ORE HELD UNDER ITS OWN INJUNCTION.

A more serious error, than the one last above referred to, is found in the fact that the court permitted the plaintiff to offer testimony concerning, and to recover for certain ores, mined in those portions of the "Compromise ground" marked on plaintiff's "Exhibit A," blocks numbered 8 and 11 (Record 213, pp. 19, 20). It appeared clearly from the testimony of Mr. Alexander Burrell, the manager of Plaintiff in Error (Record 213, p. 30), that the ore taken from these blocks, while it had been mined by his company, was being held under an injunction order issued out of the Circuit Court of the United States for the District of Montana, in an action brought by this Defendant in Error against the said company, the Plaintiff in Error herein. This was undisputed, and in fact admitted by the plaintiff. This ore was therefore *in custodia legis*, and had not been so converted to its use by the defendant, as to entitle the plaintiff to recover for it in this action. The precise thing which the plaintiff accomplished by its injunction proceedings was to prevent the conversion of the ore from blocks 8 and 11, and yet in this action a very large part of its judgment is for the conversion of ores, which the testimony shows has not been converted, but is being held at the instance of the plaintiff, and to be turned over to it, on the termination of the suit in which the

injunction issued. The court should have instructed the jury as requested by us in our third request (Record 213, pp. 45, 46), to the effect that if they found from the testimony that the defendant had not converted the ores mined from blocks 8 and 11, but had such ore ready to deliver to the said plaintiff, they should not include the same, or the value thereof in their verdict.

The Circuit Court of Appeals, in passing upon this assignment of error, says:

"Error is assigned to the refusal of the court to instruct the jury not to include in their verdict the value of certain ores which had been mined, but which had been stored by the defendant therein, under an injunction issued in the action enjoining it from 'disposing of, treating and reducing any ores heretofore removed or extracted from said premises,' for the reason that such ores were held subject to the order of the court and had not been converted to the use of the defendant. There is nothing in the pleadings, nor in the bill of exceptions to show that such ores had been returned or tendered to the Defendant in Error, or in any way accounted for, nor was evidence offered for the purpose of definitely fixing the value of such ore, so that the court could have properly instructed the jury to take the same into account."

This ore was taken from the "Compromise ground," which we claim to own, *together with the mineral therein contained*, by the highest and best title known to the law, but, laying this aside, suppose we are trespassers, as the court found us to be. We have in our possession a certain amount of ore, which we have mined from blocks 8 and 11, which we are commanded to hold and which we are holding, under the order of the court. Can

the same plaintiff in another action recover the value of the ore, and then in the injunction suit recover the ore itself? It is a maxim of equity that when a court of equity has obtained jurisdiction of a case, it will do complete justice between the parties. If in the equitable action the complainant establishes its right to the ores held under injunction, the court can require them to be delivered to it. "The governing motive of equity," says Prof. POMEROY, "in the administration of its remedial system, is to grant full relief, and to adjust in one suit the rights and duties of all the parties, which really grow out of and are connected with the subject matter of that suit."

1 *Pomeroy's Equity Jurisprudence* (2d ed.), § 114.
Disher v. Disher, 45 Neb., 100; 63 N. W. Rep., 368.
New York, etc., R. Co. v. Schuyler, 34 N. Y., 30, 45.
Adkins v. Edwards, 83 Va., 300.

William Mayger the manager of the St. Louis Company, the Defendant in Error, testified:

"No. 8 was mined last fall. I got out an injunction and restrained them from *converting that ore to their own use*, and I think the ore is stored subject to the instructions of this court. *The court holds it*, I believe. This applies also to block 11." (Record 213, p. 24.)

The injunction order and the order modifying the injunction appears at pp. 25-27 of the record, by which it will clearly appear that in and by said order, this Plain-

tiff in Error was, at the trial of this action, enjoined and restrained from "working, mining or removing any ores, quartz rock or mineral therein contained, or disposing of, treating and reducing any ores heretofore removed or extracted from said premises." And yet, under a complaint which charges us with having *converted* to our own use mineral of the value of two hundred and fifty thousand dollars, we are held for the value of the ore which the plaintiff itself, through its General Manager says we did not convert. "I got out an injunction and restrained them from *converting that ore to their own use.*" It seems to us that this is another fatal variance between the proof and the pleading, and that it was error on the part of the court not to give the instruction we requested.

The Circuit Court of Appeals says that it was for us to show that the ores were offered to or were left in the possession of the Defendant in Error, and to have submitted evidence of their value, and it says that no evidence was offered for the purpose of definitely fixing the value of such ore. We respectfully submit that there was already evidence in the case showing as definitely as could be shown both the amount and value of the ore extracted from these two blocks.

Says the witness Keerl:

"The cubic feet in block No. 8 is 2187.9, equivalent to 168.3 tons." (Record 213, p. 19.)

And as to block No. 11, he says:

"There was 28.8 cubic feet of it equivalent to 2.2 tons. I marked this block No. 11." (Record 213, p. 20.)

The witness Parks testifies:

"I took samples from block No. 8, which average $13.28 per ton. The ore taken from near the top of the winze, block No. 11, ran sixty and eighty cents to one dollar and twenty cents per ton." (Record 213, p. 31.)

Here, we submit, was the clearest proof, with reference both as to the amount and value of the ores extracted from these two blocks of ground, and it would not have been any clearer or more satisfactory, if it had been submitted by us. We had not weighed the ore or assayed it, and if we had, the proof would not have varied very much from that offered by the plaintiff. But what particular figure does the amount or value of this ore cut, when the question is as to whether the instruction offered should or should not have been given? That simply tells the jury not to take into consideration, in fixing the amount of plaintiff's damages, the ores mined from blocks 8 and 11, for the reason that such ores had not been converted, so as to entitle the plaintiff to recover for them. The amount and value of them would be therefore immaterial, and the jury when they reached these respective blocks in their deliberations, would simply pass them by, without attempting to ascertain from the testimony what was the damage the plaintiff would be entitled to recover for ores extracted from them. We respectfully submit that the reasoning of the Honorable the Circuit Court of Appeals, on this branch of the case, is not sound and that, unless it can be shown that legal conversion takes place, without actual conversion, this judgment should be reversed.

In *Walker v. Reister*, 102 U. S., 467, 469, it was held that unless the complainant sustained both of the principal allegations of the bill—namely, that the bonds were the property of the company, and that the defendant wrongfully *converted* them to their own use—this bill was properly dismissed; so here, we say it was incumbent on the plaintiff to show that it was not only the owner of the ore in controversy, but that we had wrongfully converted it to our own use; and proof that the plaintiff had prevented such conversion by the suing out of an injunction is not proof of conversion, but of exactly the contrary.

X.

OTHER ERRONEOUS INSTRUCTIONS.

The instructions embraced in our fourteenth and fifteenth assignments of error, we think, correctly state the law on the subjects to which they respectively relate. The former points out the difference between actual and constructive possession of real estate, and enunciates the well settled rule of law that in order to recover for a trespass on real estate, the plaintiff must be in possession of the same at the date on which the action is brought.

The latter, we believe, correctly states the measure of damages, as defined by this court in numerous cases, applicable to a case of unintentional trespass, such as the facts show this case must have been. The Plaintiff in Error was mining within the surface boundaries of

its own mining claim, in ground which had been conveyed to it by the plaintiff, together with all of the mineral therein contained. It was mining, as we contend, its own ore, and even if it should be held that it was mistaken with reference to its title, the evidence shows, beyond doubt or controversy, that the Plaintiff in Error was not a willful trespasser. We submit that the true measure of damages in this case was the value of the ore as it stood in the mine, and if it would not, or if any of it would not pay the costs of extraction and reduction, then it had no value and the plaintiff was not damaged.

In connection with this refused instruction we desire to call the court's attention to instruction No. 2 given by the court, and which forms the basis of our seventeenth assignment of error. We consider this instruction as being erroneous, vicious and highly prejudicial in this case. It practically tells the jury that they may render a verdict for all of the ore taken from the several blocks of ground, mentioned in the plaintiff's testimony, based upon the value of the best grade of ore to be found in that vicinity. Proof of value of the ore extracted was made by the witness John R. Parks (Record 213, pp. 20-23). The several blocks were all in the same vicinity—all in the Compromise ground, except a small part of No. 11, and the values ranged from $165.10 per ton for ore taken from block 9, down to sixty cents, eighty cents and one dollar per ton, for the ore taken from block No. 11, which was so low in value that the witness said he did not compute it. (Record 213, p. 21.)

Although, perhaps, a little digression, but as germane

to the applicability of this instruction to the testimony, we beg to call the Court's special attention to the evidence with reference to block No. 10. The value of the ore taken from this block is given at $127.14 per ton or a total of $18,626.01 (Record 213, p. 21):

"I determined the value of the ore in that stope from the nearest adjoining ground where we could get the ore."

And on pages 22 and 23 he tells where that was:

"The nearest available point is one hundred feet up the winze, where the ore is exposed. It is within that, probably eighty-five or ninety feet, I think I took the ore out through the lagging. I took about 8 pounds for this sample. It went $127.14. The winze, at the point where the sample was taken from, was from high grade ore. It carried 6.4 ounces in gold, and 4.8 ounces in silver. I took no samples from the north end of block 10, nor from any point immediately above it. The sample was taken about eighty feet above and above the middle or southern portion. I did not examine the level to see if I could find any ore, because that would have taken too much time. I could not get at the ore as well below as I could above. I could not get at what I believed was the ore body, the rich ore that had been taken out, and I wanted to get at the nearest thing to approximate to that ore. I saw some ore in the northern portion of the east side of the level in block 10, when I was there. I don't know the quantity. It was an irregular mass in the eastern portion of the one hundred and ninety foot level. There were three or four feet of it in height and a foot or two in width the whole length. The level was in low grade ore for eleven feet. The ore had been removed, though—the good ore had been removed and taken out, but I took no samples of it."

The history of block No. 10 is given by Mr. Burrell,

Manager of the Plaintiff in Error. (Record 213, p. 30.) He says:

"Block 10 was driven by us at the time the St. Louis Company sunk its winze from the forty-six foot level. We could hear them working from the stope, and, not knowing what their intentions were, we started this level out to intercept them. The work of driving this level was stopped on the thirtieth day of August, 1893. The level, as driven in what is called Block No. 10 was of regular size,—six and a half or probably seven feet and a half by five or six feet in width. I saw the material that came out of there every day. It had *no mineral value*, and was *not worked in the mill.* It was put into the level just south of our main Nine Hour shaft. I never saw a particle of copper stain in it. The ore in the Drum Lummon mine trends to the south, starting at the top and going at right angles to the dip, the ore would decrease in value as you go deep. I have heard the testimony of Mr. Parks about taking a sample in the winze, one hundred feet above block 10. A sample taken out of that point would not represent the value of the ore taken out of the level by any means, You might as well go across the range and get a piece of ore as to go there. The material that is in the level now is similar to that taken out, and you can get from block 10 an average of what was taken out. The back of the level should be a better grade really than the entire material taken from the drift, because the top is nearer the bottom of the southern trend, than the bottom of the drift corresponding to its height."

The next witness, Mr. Philpotts, testifies to having taken samples from block 10, and their assay value. He took six samples the assay of which showed values ranging from 30 cents per ton to $3.44 per ton, too low to work by any available process.

And yet the jury are instructed as a matter of law, that they "are at liberty to consider the highest value of ore found in the vicinity of that ore." It is not the "nearest available point," as it is put by the witness Parks, but anywhere in the vicinity. Under this instruction the jury might have adopted as the measure of value for the ore removed, the highest value of any ore contained in the Compromise ground, and they were not required to find from the testimony the actual value of the ore removed. Ought any verdict to stand in a court of justice, which is based on this sort of evidence, and such an instruction as this?

But, perhaps, the most serious objection we have to urge against the instructions given by the court to the jury, is to the instruction numbered one. That instruction is as follows:

"No. 1. The evidence in this case shows that the discovery vein of the St. Louis claim extends substantially from one end line to the other lengthwise of the claim; that it dips to the east, and that there is another vein having a section of its apex wholly within the St. Louis claim between the planes known as 520 and 108."

Our first objection to this instruction is that it goes outside the issues made by the pleadings. There was no issue whatever made by the pleadings as to the discovery vein of the St. Louis, or as to its strike or dip. These things were not in issue, and we believe it is true, in fact a cardinal rule governing the giving of instructions, that they *must be confined* to the issues in the case, and must not go beyond them.

Proffat on Jury Trials, § 318.
Terry v. Shively, 64 Ind., 106.
Glass v. Gilvin, 64 Ind., 106.
Capital Bank v. Armstrong, 62 Mo., 59.

"The court does not possess the power to change by instruction the issues which the pleadings present."

Frederick v. Kinzer, 17 Neb., 366.

In Oregon it is held that an instruction which directs the attention of the jury to a fact not in issue, and making their finding another fact decisive, is erroneous, although the fact under proper issues, might be material or decisive of the rights of the parties.

Marx v. Schwartz, 12 Pac. Rep., 253.

Our next objection to it is, that it is not an instruction as to the law of the case, but is the clearest sort of an invasion of the province of the jury, and a judicial finding of three facts, one of which is in issue, and two of which are not. If it had been in issue, it would have been for the jury to find whether the St. Louis discovery vein extended substantially from one end to the other lengthwise of the claim; whether it dipped to the east, and whether there was another vein having a section of its apex wholly within the St. Louis claim between the planes known as the 520 and 108. And here we pause for a moment to point out the fact that the court's finding, in this regard, seems broader than the allegation of the complaint. In paragraph IV of the complaint it

is alleged: "That the dip of one of the veins having a *portion of its top or apex* inside the surface location," etc. while the court finds that the same vein has a section of its apex wholly within the St. Louis claim. However, this is not very material. What we wish to call to the attention of the court is the obvious fact, that there is in this so-called instruction no reference to any principle of law whatever, but that it is purely and only a finding of fact. In saying this we are not overlooking the fact that in the Federal courts the judge, in charging the jury, may comment upon the evidence, and the facts which seem to him proven or not proven, but in the Federal courts no less than in the State courts, is the court prohibited from invading the province of the jury, and himself finding the facts. This so-called instruction does not purport to be a comment upon the evidence or the facts in the case, such as a judge might properly make, but if it was it would have been the duty of the court to caution the jury that it is their province to find the facts, and that they are not to be governed by his opinion, if in their judgment the evidence does not justify it.

McLanahan v. United States, 1 Pet., 170.
Lovejoy v. United States, 128 U. S., 171.
Rucker v. Wheeler, 127 U. S., 84.
Chesapeake Canal Co. v. Knapp, 9 Pet., 541.
United States v. Phila., etc., R. Co., 123 U. S., 113, 114.
St. Louis, etc., Co. v. Vickers, 122 U. S., 360.

In *Chesapeake, etc., Canal Co. v. Knapp, supra*, it is distinctly held that a judge should not give such instructions as to supersede an inquiry into the facts, and every case cited above, together with other cases, which we do not deem it necessary to cite, show conclusively that such a bald finding of fact, as the one here under discussion, cannot possibly be upheld.

XI.

CONCLUSION.

We do not deem it profitable to discuss these questions at greater length than we have done in the foregoing brief. It seems to us that each one of our assignments, discloses such a palpable error, as to require but very little from us beyond the bare statement of the proposition. Take, for example, the one last above referred to. It has been a legal maxim almost time out of mind, that *ad questionem facti non respondent judices*, and there is little more need of citing authorities to sustain a legal maxim, than there is of making an actual demonstration to establish an axiom in mathematics.

All of the questions discussed in this brief, are, however, of secondary importance to those discussed in our brief on the motions to dismiss and affirm. As the case is presented by the pleadings we do not see how it can be held that the plaintiff is entitled to extra-lateral rights on the Drum Lummon lode, entering and departing, as it is alleged to do, through the same boundary line of the St. Louis claim, and it not appearing that there is any other lode within the surface boundaries of that claim.

As presented by the complaint, the case falls exactly within the doctrine established by the case of *Catron v. Old*, cited in our former brief. It seems to us that under the decisions of this Court, when a side line becomes an end line, by reason of the fact that the lode crosses it on its strike, it becomes an end line for all purposes, and cuts off pursuit of the vein in all directions.

Should the Court, however, be of opinion that such a vein would be entitled to extra-lateral rights, then we respectfully submit that in the case at bar the judgment in the Specific Performance case, and the deed made in pursuance thereof and as a part of such judgment, must be held to be an estoppel, and if projected end lines parallel to the end lines of the St. Louis claim are to be drawn down through our claim anywhere, they must be drawn down, one through the point where the apex of the lead enters the St. Louis claim, at a point 520 feet southerly from the northeast corner of the claim, and the other through the point of intersection of the westerly boundary line of the Compromise ground with the so-called easterly side line of the St. Louis claim, between corners numbered one and two thereof.

Respectfully submitted,

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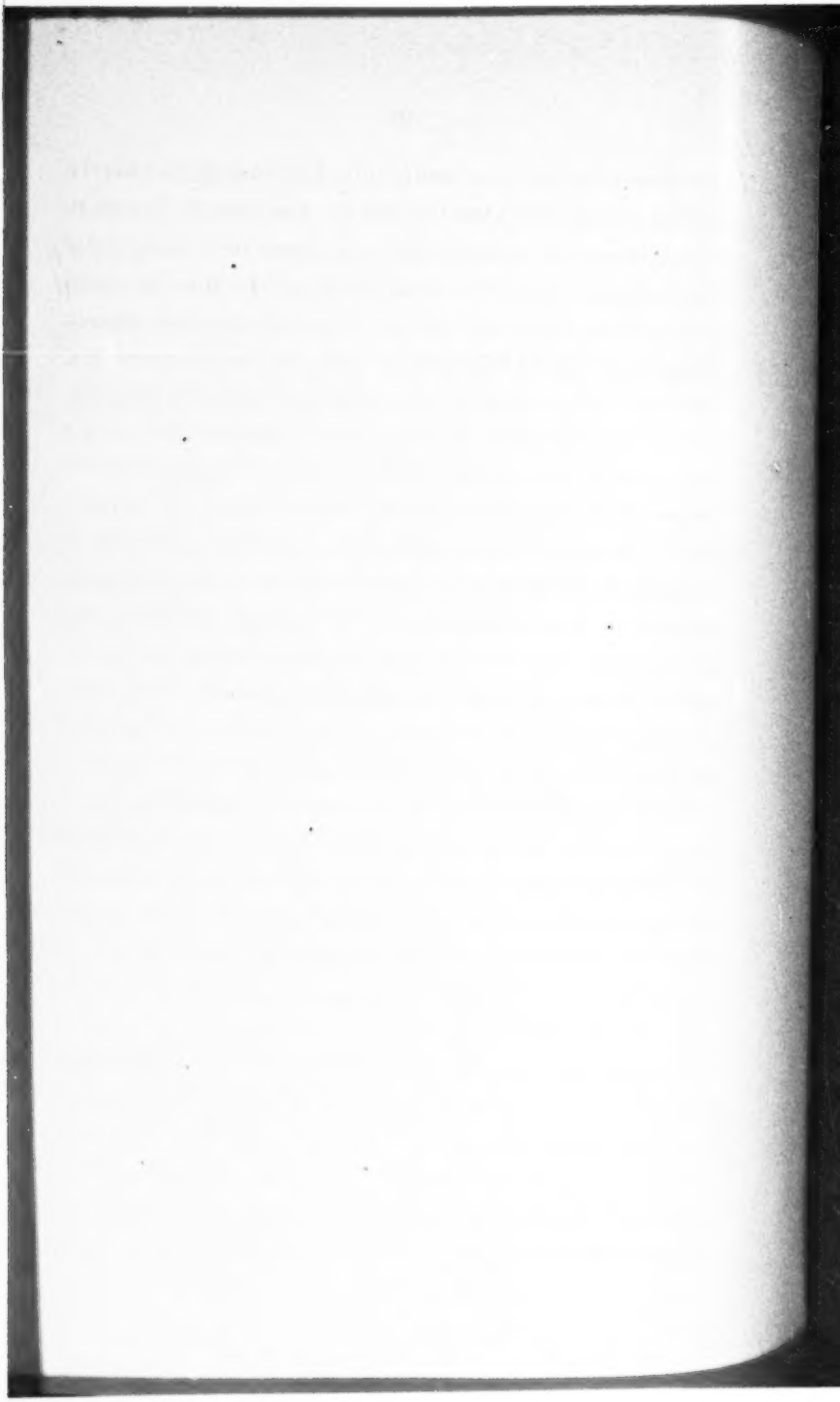

IN THE

Supreme Court of the United States

THE MONTANA MINING COMPANY, Limited, Plaintiff in Error,
vs.
THE ST. LOUIS MINING & MILLING COMPANY, of Montana, Defendant in Error. } No. 213.

THE MONTANA MINING COMPANY, Limited, Plaintiff in Error,
vs.
THE ST. LOUIS MINING & MILLING COMPANY, of Montana, Defendant in Error. } No. 214.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

While we do not deem it necessary to reply at any great length to the labored and voluminous brief filed in behalf of the defendant in error, there are a few observations which we may properly make with reference to it. In the first place the most casual reader of this brief will notice that from the beginning to the end of it there is a persistent effort made to find some vulnerable point of attack of our position, and failing in this to draw the attention of

the court to some immaterial matter about which counsel possibly may be right, or which affords them more reasonable ground of argument than do the main contentions upon which this case must turn. As illustrating this, take for example the following, found on page 4. Speaking of the deed which the defendant in error was compelled to make to us as the result of the judgment in the specific performance case it is said:

"It appears by this record that the entire premises heretofore claimed by the Nine Hour owners was thus deeded back to them, and not any less part of it."

What possible difference could it make in this case whether the Nine Hour owners secured all, or less, or more than they claimed as being a part of their Nine Hour claim and wrongfully taken, or attempted to be taken from them by the owner of the St. Louis claim? Whatever may have been the contention of the parties in the district court of Montana, in the suit to establish an adverse claim, whatever area may have been claimed, or actually shown to be in conflict in those proceedings is wholly immaterial here, and has nothing to do with any issue before the court in this case. The parties to it, our respective predecessors in interest, settled this, and the one gave and the other accepted in satisfaction of their differences, the bond for a deed appearing as "Exhibit A," attached to our answer (Record 213, page 8), and thereafter that bond became the measure of the rights of the parties, and their successors

in interest to it. If the owners of the Nine Hour at the time of the making of this compromise had, as a matter of fact, surrendered the entire surface area embraced in the St. Louis claim, that fact would not have enabled us to have recovered an inch beyond the area embraced in the compromise ground. It is not the amount of ground surrendered, or not surrendered, that is made the consideration for the bond for the deed. It is the settlement and dismissal of the law suit, and the agreement to withdraw the adverse claim in the land office which is made the consideration of this instrument.

The assertion that it appears by this record that the entire premises theretofore at any time claimed by the owners of the Nine Hour has been deeded back to them is a complete *non sequiter*. Nothing of the kind appears. It was not a matter pertinent to any issue in the case; nevertheless the defendant in error has shown exactly the contrary of what it asserts to be the fact.

It has introduced in evidence a map of the premises called its "Exhibit A." On this map is shown the southwest corner of the Nine Hour lode, and the westerly line of that claim from that corner to the point of intersection of that line with what the defendant calls the south end line of its claim. On the northerly end, the northwest corner of the Nine Hour is shown, and the point where the westerly line of that claim intersects the east line of the St. Louis.

A line drawn between these two corners shows the west boundary line of the Nine Hour claim. This court will take judicial notice of the public land surveys and of the manner in which they are made. It will therefore take notice that in the surveying of a mining claim the land department requires that the claim shall be surveyed as originally located. If it is found that the survey thus made conflicts with the surface boundaries or survey of another and older claim, the surface thus in conflict will be excluded from the area conveyed, but nevertheless upon government plats and on all plats subsequently made of the ground, the lines will remain as originally surveyed and as the claim was originally located. It therefore does appear conclusively from the evidence in this case that the Nine Hour owners surrendered a very much greater area than was conveyed to them in the compromise ground.

Further illustration of what we mean is found in the fact that counsel throughout their brief seem anxious to draw us into some controversy regarding what we said by way of argument, or was contained in our briefs in the courts below. Apparently they think that when we have touched a subject we have exhausted it, and that we ought to be foreclosed from pursuing it further, or restating our position with reference to it in clearer or more emphatic language. An example of this is found at page 25 of their brief. They say:

"Plaintiff in its brief filed in the court below says:

"'Allegations of fact by the pleadings repugnant to the correct construction of the contract may be disregarded.' and at the top of page 21 authorities are cited to support this proposition."

If they have found such a proposition as this, in one of our briefs, and the authorities we have cited sustain our position, it is quite possible that it may be good law, and that they may rely upon it with safety. But the converse of this proposition is also true and allegations of fact by the pleadings not repugnant to the correct construction of the contract cannot be disregarded, as, for instance, in the case at bar. The complaint alleges that the plaintiff is not the owner of the compromise ground nor of the mineral therein contained, and that the defendant is the owner thereof. This allegation is in strict harmony with the correct construction of the bond, the judgment and the deed, and cannot be disregarded. Nor is there any good reason why these allegations of the complaint should be disregarded. The defendant in error made them deliberately and voluntarily, not as a mere recital of the contents of the bond or the deed, but as a statement of issuable facts which we were at liberty to admit or deny, as we might be advised. The pleading in which they are contained is duly verified by the oath of its manager, and we see no reason why these solemn allegations should be disregarded.

Again, we have somewhere inadvertently said that what

was or was not an end line of a mining claim could only be determined by ascertaining what line the lode actually crossed on its course or strike through the vein. Counsel seize upon this and argue with great earnestness and much show of learning, at page 38 and elsewhere through their brief, that we are in error, and that it is not necessary to entitle a vein to extralateral rights that it should pass through any line of the claim. We did not mean that before a vein could be accorded extralateral rights it must be actually demonstrated, as a physical fact, that its apex passed through the end line of the claim as located, and counsel knew, or ought to have known, that this was not our contention. We quite agree with Judge Lindley upon this proposition.

"If he establishes the existence of an apex, he is not compelled to show that it passes through his entire claim, crossing both end lines, or that it actually crosses either of them, so long as it does not appear that *it crosses the surface boundaries in such a manner as to deprive him of all extralateral rights.*"

2 *Lindley on Mines*, sec. 867, p. 1126.

The italics are ours, and they cover exactly the proposition which we have sought persistently to call to the attention of counsel, and which they have just as persistently refused to see. Their complaint shows that the Drum Lummon vein crosses the boundaries of their claim in such a manner as to deprive it of all *extralateral rights*. We fur-

ther claim that if they are entitled to extralateral rights by virtue of having, or being entitled to extralateral rights on their discovery vein, they have not pleaded any such vein, or any such rights, and therefore they must stand or fall on the extralateral rights possessed by the Drum Lummon vein. The innocence of counsel in this respect is shown by their contention that because extralateral rights were accorded to the vein, in the Del Monte case and in the Black Rock-Niagara case, that the defendant in error is entitled to extralateral rights on so much of the Drum Lummon vein as happens to lie within the surface boundaries of its claim, despite the fact that the only line of the claim crossed by the lode on its strike is the one it calls the east side line. Counsel close their eyes to the fact that in the Del Monte case, in the Black Rock-Niagara case, and in every other case where extralateral rights have been accorded to a vein passing out of the side line of a claim, the lode on its strike also actually crossed an end line of the claim as located. With a lode crossing a *side line* and an *end line* the latter affords a mathematical base from which a projected parallel line may be drawn down at the point of the departure of the lode through the side line, and these two lines will mark the boundaries of the plane through which the lateral rights of the vein may be pursued.

II.

Does the complaint state facts sufficient to constitute a cause of action?

Leaving these comparatively unimportant matters to take care of themselves we purpose reviewing, very briefly, the more serious discussions presented on behalf of the defendant in error. It is insisted with much pertinacity that because the bare averment of ownership is a sufficient allegation of title, in an action of ejectment, it ought to be good in an action of trespass. In some forms of trespass perhaps this might be true, but when you come to an action of the character attempted to be presented by this complaint the matter is quite different. When a miner leaves his own ground and invades the territory of an adjoining claimant, that moment every presumption of law and legal intendment which has been his shield while within his own limits abandons him and attaches to his neighbor whose territory he is thus invading.

"There is a presumption of ownership in every locator to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits until some one else shall show, by a preponderance of testimony, that such deposit belongs to another lode having its top or apex elsewhere."

Leadville Co. v. Fitzgerald, 15 Fed. Cas., p. 101 (C. 8158).

Substantially to the same effect are the following:

Cheesman v. Shreve, 37 Fed. 36.

Oron S. M. Co. v. Campbell, 17 Col. 267.

Bell v. Skillicorn, 6 N. Mex. 399.

Doe v. Waterloo, etc., 54 Fed. 935.

Jones v. Prospect M. T. Co., 21 Nev. 399.

He must therefore show his right to be there not only by strict proof, but by strict pleading as well. Counsel, p. 20 of their brief, refer to our quotation from the opinion in *Cons. Wy. G. M. Co. v. Champion M. Co.*, 63 Fed. 540, and exclaim exultingly:

"His honor, Judge Hawley, does not say until you allege."

This probably draws the line of our dispute a little more sharply. The contention of counsel for the defendant in error is that they may prove material issuable facts without pleading them. We, on the other hand, contend that to admit the proof there must be found appropriate allegations in the pleadings. The question we have to deal with is one strictly pertaining to the pleading. Our objection made at the beginning of the trial was, in effect, a demurrer for want of sufficient facts to constitute a cause of action. The circuit court was then called upon to determine, as a question of law and unaided by the proof, of a solitary fact whether the complaint stated a cause of action. This court,

in passing upon this question, will now regard it from the same point of view which the circuit court occupied when it was compelled to pass upon it. This court must take the pleading and from its contents, wholly unaided by any outside information, determine whether between the four corners of it there are facts stated which, if proven, will constitute a cause of action. It will be seen at a glance that but one vein is referred to in the pleading, and that vein passes in and out of the claim, through the same boundary line. Now, whether it be the discovery vein, or as counsel term it, a by vein, it seems to us that standing by itself it can have no extralateral rights. The supreme court of Colorado and Judge Lindley are too clearly right about this to make it worth while to discuss it. It is therefore a clear proposition that if the Drum Lummon vein in the St. Louis surface has any extralateral rights it is because of something outside and independent of its own existence there and passage through the ground. It is because there is a discovery vein within the surface boundaries of the St. Louis claim upon which its owner is entitled to claim extralateral rights to the same extent and in the same direction as it is claiming them upon the Drum Lummon. Now, in the absence of all allegations with reference to the discovery vein and its rights, how is the court to say that this pleading is sufficient as a question of law? How can it be held that a pleading states a cause of action or a defense in the absence of all allegations of fact necessary to appear

on its face to enable the court to determine whether it does so or not.

Nor are these allegations of mere probative matters embraced in the plaintiff's allegation of the ownership of the St. Louis claim, as is vaguely contended by the defendant in error. It may be, as it is, the undisputed owner of the St. Louis claim, and for that matter of the Drum Lummon vein within the St. Louis surface. This may all be true, and yet the discovery vein of the St. Louis may run across the claim so as to pass on its strike through what have been denominated the side lines of the claim, in which event the owner of the St. Louis vein would not be entitled to extra-lateral rights on the Drum Lummon, or, if the course of the St. Louis vein is substantially in a northerly and southerly direction, it may dip to the west, in which event there would no right to pursue the Drum Lummon vein on its dip to the east.

These are material and issuable matters which, if denied and not established by the plaintiff on the trial of the case, would result in a judgment against the plaintiff. The line of distinction between what are issuable matters and what are probative matters is not always very clearly drawn. The late lamented Justice Field, when chief justice of the supreme court of California, had occasion, in the case of *Green v. Palmer* (15 Cal. 411), to examine a complaint which was not, like the complaint in the case at bar,

"a model of perfection." In this opinion he quotes with approval from a manual written by one of the commissioners engaged in framing the New York code; and, among other rules thus stated, after pointing out the difficulty which sometimes arises in determining what are issuable and what are probative facts, he quotes the following:

"The following question will determine in every case whether an allegation be material: 'Can it be made the subject of a material issue?' In other words, 'If it be denied, will the failure to prove it decide the case in whole or in part?' If it will not, then the fact alleged is not material; it is not one of those which constitute the cause of action, defense or reply."

Green v. Palmer, 15 Cal. 411-416.

Substantially the same rule is laid down by Judge Bliss, in his excellent work on Code Pleading. He says:

"The pleader may sometimes be enabled to decide whether a fact is evidentiary merely, or an ultimate one to be pleaded, by inquiring whether the denial of such fact would make a material issue—whether if the denial be sustained the defendant may not still be liable."

Bliss on Code Pleading, Sec. 206.

Applying this rule to the case at bar, can there be any doubt of the proposition, that if it were found that the discovery vein on the St. Louis ran in an easterly and westerly direction, so that it would cross the alleged side lines of the claim, that there could be no extralateral rights claimed on the Drum Lummon vein within that claim. Or if,

as suggested by them, it dipped to the east, while the Drum Lummon vein dipped to the west, the right of pursuit would unquestionably be lost.

III.

A COMMON LAW DEED.

The learned counsel for the defendant in error have much to say in their brief about a common law deed and a common law construction of the bond, the judgment and the deed in the specific performance case, and they ingeniously argue that, because extralateral rights are given under the Mineral Land Act of May 10, 1872, a deed for a mining claim should have some different construction given to it than a deed or other contract in writing relating to other classes of land, or to other matters. It is vaguely hinted that, either under the Mineral Land act, or some other act of congress, there is authority for the distinction which they seek to draw between what they term a common law deed and a mining deed. We know of no provision in any act of congress providing for the construction of an instrument relating to mining claims, in any different manner from that applied to every other instrument pertaining to the transfer of property; and, so far as the decided cases go, there is not an expression in any one of them which would warrant the conclusion that the slightest difference is to be made between the construction of such instruments

and instruments of like character, but relating to other classes of real estate. The language used in the mining deed, like that used in any other contract between parties competent to contract, is to be determined, where there is any ambiguity in the language used, by an inquiry as to what was the intention of the parties. Where, as in the case at bar, there is no ambiguity whatever, there is no room for construction in one case any more than in another. In each case precisely what is included within the instrument will pass to the grantee, and that which is not included, or which in the instrument itself is reserved, remains in the grantor. If the grantor says in his deed to a mining claim, or a portion of it, that he conveys all mineral therein contained, the court, as in the specific performance case, must take him at his word and hold that he is bound by his deed, and that whatever he has conveyed by plain and unmistakable language, he has not retained and is not possessed of, after the execution of his deed. Counsel for the defendant in error pretend to find some support for their contention in the Del Monte case, but they do not quote a syllable from that decision which tends to support them at all, nor is there anything to be found in the decision which would have that effect. To assure ourselves that this is so, we need not look further than to the statement of facts made by the court, from which it will appear that there was no deed or contract of any character involved in this litigation.

IV.

THE ANSWER.

Since we are attacking their complaint, counsel seem to think that they will be justified in carrying the war into Africa by attacking our answer for the first time in this court. They say, on page 23 of their brief:

"If the answer admits the title of defendant in error to the mineral in the vein, lode or ledge in question, in so far as it has its apex inside the surface boundaries of the St. Louis lode claim, notwithstanding it has dipped beneath the compromise strip, then the affirmative allegations of the answer must be reconciled with this admission, or else there is a *fatal repugnancy of a very malignant character.*"

This lies, they say, in the fact that we have admitted their title to the St. Louis, as alleged in the second paragraph of their complaint, and then denied the right to pursue the Drum Lummon vein into the compromise ground and the Nine Hour claim. They assert that this admission and denial are inconsistent, the one with the other, and they cite an authority from the supreme court of Oregon to the effect that the affirmative allegation should be stricken out.

To this contention there are two answers. In the first place, if it were absolutely good, and if there was in fact an inconsistency between the two, counsel could not raise it for the first time in this court. If there was anything in

it, they should have demurred to our answer, or have moved to strike, and by replying to it, instead of taking some action to purge it they have waived all right to complain of it. On page 31 they quote Section 685 of the Code of Civil Procedure of the State of Montana, which clearly shows that, however great the repugnancy might be it is too late for them to urge it now.

But if counsel will look a little closer into our answer they will find that, while it may not be a "*model of perfection*," it is not the malignant monster which they apparently fear it is. What is it we have admitted in paragraph 1 of our answer? First, the corporate character of the respective parties to the suit, as alleged in paragraph 1 of plaintiff's complaint; second, that it is the owner of the St. Louis lode mining claim, and of the quartz, rock and ore and precious metals contained therein, "save and except that portion thereof known as the thirty foot strip, or compromise ground, * * * together with all mineral contained therein;" third, that the compromise ground aforesaid and the Nine Hour lode are the property of this plaintiff in error. The answer is absolutely harmonious, absolutely consistent, and so is the complaint. Counsel have the mistaken idea that we are attacking their complaint because of some ambiguity contained in it, and insist that if there was any objection to it upon this ground it should have been taken by demurrer. There is no ambiguity in the complaint. It alleges the exact facts. The de-

fendant in error is the owner of the St. Louis mining claim and of all the mineral and precious metals therein contained, save and except the compromise ground and the mineral therein contained, which is the property of the plaintiff in error, just as is alleged in the complaint. The only inconsistency there is between the admissions, denials and new mater set up in the answer is that, inasmuch as no claim is made in the complaint to the mineral contained in the compromise ground, it was probably unnecessary to plead the judgment in the specific performance case as an estoppel; but the rule of pleading is, that where a party relies upon anything as an estoppel he must plead it at the first opportunity to do so, or he waives it. We chose not to rely upon the admissions and averments found in the plaintiff's complaint, but to set up our estoppel and plead it affirmatively. The complaint avers what are the exact facts, as is disclosed by the record. It does own the St. Louis claim, and no denial of that fact would have availed us anything. We, on the other hand, do own the compromise ground, together with the mineral therein contained, and this fact the defendant in error not only affirmatively alleges but is estopped from denying, and is by the judgment in the specific performance case perpetually enjoined and restrained from ever claiming "all interest or claim to the said premises, or to any part or portion thereof, or to the possession of the same or any thereof."

V.

WHERE THE APEX OF A VEIN CROSSES INSIDE AND OUT OF A CLAIM THROUGH THE SAME BOUNDARY LINE, MAY IT HAVE EXTRALATERAL RIGHTS?

Counsel argue at considerable length that if the Drum Lummon vein were in fact their discovery vein, which they are careful to assure us it is not, that—even in that case—it would be entitled to extralateral rights, because it traverses their claim for some distance in a direction more or less parallel to the line they deem the east side line of their claim. They cite several authorities which they profess to think support their contention. We cannot find a word in either one of the cases referred to which recognizes the right in the remotest degree. We therfor purpose leaving this question without further discussion. To us, the reasoning contained in Catron v. Old, 23 Colo. 433 (48 Pac. Rep. 687) is simply unanswerable, and we leave this question to be determined by the court as between the gentlemen on the other side and the supreme court of Colorado.

VI.

ESTOPPEL.

We now reach the question which apparently gives counsel on the other side more concern than anything else in the case, as they have devoted 55 pages of their very excellent brief to its discussion. They start out by rearguing the proposition already fully discussed that they have extralateral rights on the Drum Lummon vein, though it passes in and out of the same boundary line of the claim, and although there is no discovery vein within such surface boundaries having extralateral rights to the same extent, and in the same direction as those claimed for what they term a "by," or other vein. Having reached a conclusion satisfactory to themselves on this question, they proceed to examine the effect of the deed on the right of the defendant in error as the owner of the St. Louis claim to pursue the Drum Lummon vein into the compromise ground. Ignoring the fact that this deed is in fact a part of the judgment in the specific performance case, and that in its execution the parties to it manifestly could have had no intention whatever which could serve as a guide to its interpretation, they proceed to inquire what was the intention of the parties to it at the time of its execution. They absolutely refuse to accept our view of the situation, that the estoppel is one that arises more from the judgment than from the

deed, although perhaps this may be a distinction without a difference. If a party is estopped from doing a certain thing, it is probably a matter of little concern whether such estoppel arises from one cause or another. They in a measure recognize that canon of construction which declares that, where the language of the instrument is plain and unambiguous, it is the duty of the court to give it effect according to its plain intent and meaning, and that there is no room for construction, and to this end they quote from the printed matter usually contained in blanks for mining deeds (see defendant in error's brief, page 46), and they claim it is possible to attribute more than one meaning to some of this language. This form of deed has been in use in California, Montana, and other mining states, for a good many years, and if there is any ambiguity about this language, that fact does not seem to be determined by any adjudicated cases in courts of the states where such deeds have been in use. Just what this ambiguity is we do not clearly gather from the inquiry made by counsel. "Was it intended," they ask, "to convey by vertical lines, as in the case of agricultural lands, or was it intended to convey only such ores as the Nine Hour claim would have been entitled to had there not been a wrong survey across a part of its area, or was it intended to convey that which wholly or in part apexed within said claim?" What the language quoted from the deed has to do with these inquiries is past our comprehension. To us it is clear that, by the terms of

the bond executed by their predecessor in interest to our predecessors in interest, it was expressly stipulated that, upon the procurement of patent, he would convey to them the compromise ground, together with all mineral therein contained. That, by the judgment requiring the specific performance of this contract, the defendant in error was compelled to convey to us the compromise ground, together with all mineral therein contained, the latter being expressly mentioned in the deed as a part of the description of the specific property to be conveyed. And not only this, but by the judgment and deed referred to, it was compelled to and did convey to us "all and every right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said party of the first part of, in or to the said premises, and every part and parcel thereof, with all of the appurtenances" (record 213, page 11). To say that this plain, emphatic language is capable of two constructions, or that having made such a deed the defendant in error has yet an interest of any kind or character in the compromise ground, seems to us so absurd as not to be worthy of serious discussion.

It will be noted that the words quoted at page 46 of defendant in error's brief, from the deed, do not appear in the original bond (Exhibit A, attached to defendant's answer.) The situation and intention of the parties at the time of the execution of this bond is the only subject en-

titled to be considered as bearing upon the construction of any of these instruments. For some reason counsel for the defendant in error ignore this bond completely, and we are invited solemnly to a consideration of what were the intentions of the parties to the deed at the time of its execution, and authority after authority is cited to prove to this court that, where there is anything in a deed or other written contract which is ambiguous and requires construction it is proper for the court to sit down as nearly as may be, in the seats which the parties occupied when they made it. This is so nearly common knowledge that almost every intelligent layman understands it, and there was no use in citing a single case or quoting a syllable from any decision to establish such a perfectly clear proposition. We do not purpose being beguiled into a controversy with counsel on the other side over a proposition so elementary and so thoroughly well established; but we cannot refrain from saying that we know just as well as they do that all of this show of learning is a mere pretense for the purpose of turning away attention here from the poverty of their case.

We cheerfully yield acquiescence to the doctrine for which they contend, and say that, in a proper case—where there is something ambiguous to be construed—this is the first canon of construction, but we also say that it has no place in this case. In this case there is absolutely nothing to construe, either in the bond, the judgment or the deed.

Each and every of these documents is couched in such plain unmistakable language that there is no chance for any controversy or two opinions about it. Joining hands, however, with our adversary, and going in quest of the intention of the parties to this deed at the time it was made, we find it was not the intention of the grantor to convey us anything, either of the surface or of the mineral rights in the compromise ground, if it could possibly avoid doing so. On the other hand, it was the intention of the grantee to get both the surface and all of the mineral under the surface, in exact conformity with the calls of its bond and the judgment of the court. What is there therefore to construe, since we have here clearly and unmistakably the intention of the parties to this deed. We find further that a court of competent jurisdiction inquired carefully and patiently into the intentions of the parties to the bond at the time it was made, and the deed is the result of its deliberate judgment as to what those intentions were. A final judgment of this character ought to be the end of the law, but here counsel for defendants in error and ourselves are at issue. We say the judgment rendered in the specific performance case was a final adjudication of all of the issues involved in the pleadings in that case; they contend that, in the case at bar, they were entitled to reopen this judgment. On pages 46-7 of their brief they say

"Of course that evidence must consist in proving the peculiar circumstances under which the survey was made,

the controversy in the land office between the parties, the contention in court which was the result of the controversy in the land office, and the contract made in compromise of that controversy, and the suit thereon."

The most casual reference to the judgment roll in the specific performance case will show that we fought every one of these questions out in that case, and that every one of them was solemnly decided in our favor. Must we again "thresh over this old straw," or may we go into court and rely upon what was adjudged in the former controversy?

Having thus cited all of the authorities that could be conveniently found, and having quoted elaborately from each to establish a proposition which they knew we would not dispute, and which they knew it would not do us any good, either in this court or elsewhere, to dispute, they reach the startling conclusion (brief, page 52):

"That the St. Louis did not deed, and therefore reserved, all the rights it would have had had the claim been surveyed originally to and including its present boundaries. That was the intent of the parties."

If this is true, if counsel are right about this, it is most surprising that in the bond for a deed some word was not said from which this intent could have been gathered, and it is equally surprising that, by the language employed, they said exactly the contrary to what they intended. In support of this, they say the records of the specific performance case is filled with statements that this strip was

to be considered as part of the Nine Hour claim, and not as an independent purchase or conveyance. It is not material what this strip then was or had formerly been, or what it was to be considered to be. It does not matter whether it was, as they contended in the specific performance case, always a part of the St. Louis claim, as originally located, or as they now contend in this case, always a part of the Nine Hour claim, as located. The plain unvarnished facts are that the predecessors in interest of the parties to this controversy had an action in a court of competent jurisdiction; they compromised it; our predecessors in interest agreed to dismiss their suit and withdraw their adverse claim in the land office, so that their predecessor in interest might obtain a patent for his St. Louis mining claim, and he agreed, in consideration of their doing so, that as soon as he obtained his patent he would deed to them this compromise ground, together with all the mineral therein contained, without any reservation or exception whatever, and that is all there is to it. It does not matter whether the deed was upon the blank form usually used for conveying mining property or upon a form used for the conveyance of any other character of real estate. In every case the intention of the parties and the character and nature of the transaction would have to be determined from the instrument which they used in executing it. Suppose the deed conveyed all mineral below a certain level in the mine, or all mineral lying north of or east of, or in any

other direction from, a given line or place in the claim, or all mineral in any specified piece or parcel of it, could the defendant in error be heard to say it did not mean all the mineral in that ground, but only intended it to be a specified portion of it? Counsel would have us believe that when you are talking about a mining claim, all does not mean all as the lexicographers understand that word. Although your deed says all the mineral, it does not mean all, but only a very small part of it. Let us not pursue this further. This part of the argument in their brief is as transparently thin as the other portion which undertakes to establish the fact that where there is an instrument so ambiguous as to need construction you must ascertain the intention of the parties to it, so as to ascertain its meaning.

Before passing from the consideration of this portion of the brief we want to call the court's attention to another matter along the same lines as those we have just been discussing. Counsel there say:

"By the pleadings and findings it is demonstrated that the strip always was a part of the Nine Hour, and that under the covenant defendant held the pure legal title in trust, and that the intention was to convey and restore it to the beneficiary of the trust, *and not to convey any right or interest of the trustee in his own individual property.*"

A very considerable number of very respectable authorities, among which is one decision from this court, are cited as sustaining this doctrine. To our way of thinking, how-

ever, the quotation just made is as fine an example of begging the question as can be found in any treatise on applied logic. Whose property was it? Is the mineral contained in the compromise ground the property of the plaintiff in error or of the defendant in error That is the question? We have a deed for it, made in pursuance of a judgment of a court of competent jurisdiction, which decided that we were the owners of it, and compelled the defendant to execute a deed for it to us. Shall we have the benefit of the judgment rendered in our favor after a full and patient trial of the cause, or are the judgments of Montana courts not entitled to the full faith and credit guaranteed by the constitution of the United States to judgments of all courts of competent jurisdiction? From all of these authorities, counsel draw a conclusion very satisfactory to themselves, on page 78 of their brief, as follows:

"So here, by examining the pleadings, covenant and findings, it will clearly appear that the judgment was intended to cover, and *could only cover* the trust property, i. e., the strip of the Nine Hour claim, being all that was involved in the litigation."

If this conclusion is warranted by the law and the facts, we think counsel have been remiss in their duty to their clients. If the words "together with all the mineral therein contained" did not embrace anything involved in the controversy, they should not have been inserted in the judgment; counsel should have objected to the insertion of

that language in the judgment; and, if the court arbitrarily inserted the words they should have brought it to the attention of the appellate court and had it corrected, either in the supreme court of Montana, or in this honorable tribunal, when the case was here. If these words, which under the rules of construction must have some meaning attached to them, meant nothing and conveyed nothing, they had no place in the deed and ought to have been expunged therefrom. Our contention, on the other hand, is that these words must be given effect according to their plain intent and purpose, as understood by the parties to the bond and as found by the court in the specific performance case.

A word with reference to the case of *Stinchfield v. Gillis*, 96 Cal. 400; 107 *idem* 86, cited in our brief on the motions, and we have done with this branch of the case. Counsel quote liberally from the opinion in this case, and say that the case does not sustain our contention. We cite this case for the purpose of showing that the grantor of a mining claim, or an interest therein, may be estopped by his deed, precisely as the grantor of any other character of real estate may be estopped by his deed. In other words, that there is no distinction between a "common law deed" and the deed of a mining claim, except in the fertile imagination of counsel. The deed of Gillis to the plaintiff in that case—an ordinary bargain and sale deed—was held to es-

top him from claiming gold, which, under the provisions of Section 2336, *U. S. Rev. Stats.*, would have most unquestionably been his, but for the estoppel created by his deed, just exactly as the gold in the compromise ground in all leads apexing within the surface boundaries of the St. Louis would be its property but for the estoppel created by the judgment in the specific performance case. A writ of error was sued out by Gillis and the case brought to this court (159 U. S. 658). It was dismissed for want of jurisdiction, and Mr. Chief Justice Fuller, speaking for the court, uses this language:

"It is, however, contended that the record shows that a federal question arose in the case, as considered by both the superior and supreme courts, and was decided adversely to plaintiffs in error, namely, that Gillis had the right to follow what was known as the Rice vein, which had its apex on the Carrington mine, upon its dip, beneath the surface of the Pine Tree mine, and to appropriate to his own use the gold found in the vein at the point of its intersection with the socalled west vein, which had its apex on the Pine Tree mine, because the Carrington was the older or prior location; and that this could only be determined by an application of Sections 2322 and 2336, Revised Statutes. But the decision of the supreme court was clearly based upon the estoppel deemed to operate against the plaintiff in error, upon general principles of law and the statutes of California in respect of such a conveyance as that to Stinchfield irrespective of any federal question. And this was an independent ground broad enough to maintain the judgment. The writ of error must therefore be dismissed."

If the contention of the defendant in error is valid, that an estoppel by deed cannot be created where the property conveyed is an interest in a mining claim, then we respectfully submit that the decision of this court in *Gillis v. Stinchfield* was wrong. The court should have held that the deed was incapable of creating an estoppel, as against the plaintiff in error claiming a right which was granted to him under the mineral land act. That the deed must be construed with reference to the "peculiar property" which it was sought to convey, and that the common law doctrine of estoppel did not apply to this character of a case. And if the theory of counsel for the defendant in error is right and is the law, here was the clearest sort of a federal question presented on this record. Either counsel are wrong, or this court was wrong in *Gillis v. Stinchfield*. The two theories cannot be reconciled.

OTHER CONTENTIONS.

Counsel for defendant in error seem to have exhausted themselves on the subject last considered, and they pass the other controversies presented in this case with very little discussion. While we have not treated these other matters as fully in our brief on the merits as we might have done with advantage, we will leave the discussion where the defendant in error has left it, and content ourselves with what we have said in our former brief. There seems to be some claim made in the brief that as to some of these

points they are to be treated as abandoned by us, because we did not press them with that vigor and earnestness in the lower courts which we ought to have done. It may be that this is the reason that we have been defeated in two courts in a case that seems to us to be so absolutely plain and clear. Our desire not to fail for the same reason in this court must be our apology for troubling it with so many briefs. We feel that the judgment in this case is so outrageously unjust that a failure to secure a reversal, due to any want of earnest effort on our part, would be little short of criminal negligence.

Respectfully submitted,

W. E. CULLEN,
CHAS. J. HUGHES, JR.,
EDWARD C. DAY,
Attorneys for Plaintiff in Error.

ALDIS B. BROWNE,
ALEX BRITTON, of Counsel.

No. 213.
By E. Toole, Bach, Brown & Henderson for D. C. (illegible)
FILED
DEC 9 1901
CLERK

In the Supreme Court

Filed Dec. 9, 1901.

United States.

OCTOBER TERM, 1901.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.
} No. 213.

NOTICE OF MOTION, MOTION TO DISMISS AND AFFIRM AND ARGUMENT.

E. W. TOOLE,
THOS. C. BACH,
ARTHUR BROWN,
H. P. HENDERSON,
Counsel for Defendant in Error.

H. S. Thurber & Co., Printers, Helena, Mont.

24730

In the Supreme Court
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THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error.

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

No. 213.

To Messrs. Charles J. Hughes, W. E. Cullen and E. C. Day, *Counsel for Appellants:*

Gentlemen: Please take notice that on Monday, the 30th day of December, 1901, at the opening of Court, or as soon thereafter as counsel can be heard, the motions, of which a copy is herewith served upon you, will be submitted to the Supreme Court of the United States for the decision of the Court thereon. Annexed is a copy of the brief of argument to be submitted with the motions in support thereof.

E. W. Toale
Thos. C. Bach
Arthur Brown
H. P. Henderson

Counsel for the Defendant in Error.

Due and timely service of the foregoing notice and of the following motions to dismiss the appeal herein and affirm the judgment, and receipt of a copy thereof, on this 30th day of November, 1901, is hereby admitted.

Dated: November 30th, 1901.

Chas. J. Hughes, Jr.
E. C. Day

Counsel for Plaintiff in Error.

Copy

In the Supreme Court

OF THE

United States.

OCTOBER TERM, 1901.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error.

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

No. 213.

MOTION TO DISMISS AND AFFIRM.

Comes now the defendant in error, by E. W. Toole, Thomas C. Bach, Arthur Brown and H. P. Henderson, its attorneys appearing in that behalf, and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because the case was not one in which the jurisdiction of the court was at issue, nor one that involved the construction or application of the Constitution of the United States, nor one in which the constitutionality of the law of the United States, or validity or construction of any treaty made under its authority was drawn in question, nor one in which the constitutionality of a law of a state was

claimed to be in contravention to the Constitution of the United States, nor one in which any federal question whatsoever was involved, but was a case in which the jurisdiction of the Circuit Court was dependent entirely upon the opposite parties to the suit or controversy being one a citizen of the United States, and the other an alien, a citizen of Great Britain, and the judgment was not given upon any federal question reviewable by this court, and that the judgment of the Circuit Court of Appeals was final so far as the question of review was concerned.

And the said defendant in error, by its attorneys aforesaid, also moves the court to affirm the said judgment of the Circuit Court of Appeals on the ground that it is manifest that said appeal was taken for delay only and that the question on which the jurisdiction depends is frivolous and does not need any further argument.

DATED: Nov. 30th, 1901.

E. W.
Thos.
Arthur
& H. P.

Attorneys for Defen

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

(No. 213.)

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR, ON MOTION TO DISMISS.

The complaint of the defendant in error, plaintiff below, was filed in the United States Court at Helena, Montana, to recover damages for trespass comitted upon a vein of rock in place bearing gold, silver and other precious metals, having its apex entirely within the premises of the plaintiff, described in the complaint. The name of the mining claim of the plaintiff was the St. Louis Quartz Lode. The complaint alleged that it was the owner of the premises of that mining claim, describing it by boundaries. It alleged that one of the veins belonging to the plaintiff dipped underneath the surface ground of the premises belonging to the defendant. That the defendant had entered upon a portion of that vein and extracted a large amount of ore therefrom; alleging the value of the amount so extracted. The complaint also stated at considerable length, and in detail, the direction and nature of the vein. The jurisdiction of the court, however, was invoked solely upon the ground that the plaintiff was a corpor-

ation of the state of Montana and that the defendant was an alien.

The answer practically was a general denial permitted by the practice of the State of Montana, and therefore in the federal practice, and also an allegation that the defendant had acquired the title by deed to a thirty-foot strip of compromise ground, adjoining the premises of the plaintiff on the east for a part of the length thereof; that it had acquired the same in pursuance of a previous contract by which plaintiff has been permitted to patent its claim of the St. Louis, and that the plaintiff was thereby estopped to enter upon the premises of the defendant. (Record p. 7.)

The issues thus presented were these:

1. Did the vein dip underneath the premises of the defendant?

2. Had the defendant extracted ore therefrom?

3. Was there a contract between the plaintiff such as would estop the plaintiff from bringing this action?

The plaintiff below, defendant in error, claims that no federal question was presented in either of these issues. That they are all the issues involved. Plaintiff in error claims, however, that because the description of the vein, for a trespass upon which this action is brought, is shown by the description of it to have entered at a side line, and it is claimed, though not conceded by the plaintiff in error, that it is shown to have passed out at another portion of this side line. The St. Louis claim was not a rectangle, but there was an angle in one side of the claim. It is claimed by the plaintiff below,

defendant in error, that in fact the vein entered at one end line and passed out at the other, though the hanging wall of it at places may have been near to and perhaps passed over and returned again, but the direction of that wall we consider immaterial for the motion here. (Illustrated by a map made a part of one of the briefs used by Defendant in Error in Circuit Court of Appeals.)

The evidence disclosed that the St. Louis Quartz Claim was an older claim than that of the defendant, which was called the Nine Hour Claim; that the St. Louis claim of the plaintiff was not located upon the vein involved in this case at all; that the vein upon which the St. Louis claim was located was called the St. Louis vein, and that the vein involved in this litigation was a portion of what is known as the Drum Lummon vein. That the plaintiff claimed title to it and to the ores in it as one of the "other" veins mentioned in the Statute, to which it was entitled so far as the apex was within its limits and so far as it had the right to follow.

The evidence also showed extensive trespasses, and so far as this case is concerned, was limited to that part of the vein lying northerly of what was known as the one hundred and eight foot plane. The court having ruled that for the twenty-five feet between the one hundred and eight foot plane and the one hundred and thirty-three foot plane, plaintiff could not recover. So that the question in this case of the right to recover for the twenty-five feet or jurisdiction of this court, relative to that section, is not involved. The defendant below, plaintiff in error, succeeded in that part of its contention. The plaintiff only recovered so much of the ores

as shown to lie northerly of the one hundred and eight foot plane.

Upon this state of facts plaintiff, defendant in error, claims that there was no federal question involved whatsoever for the following reasons:

1. That the suit having been brought on the ground that the plaintiff was a citizen of Montana and the defendant an alien, and for no other reason, and no federal question having been raised by the answer, the decision of the Circuit Court of Appeals became final under the statute and cannot be reviewed here.

2. That the right to recover upon the vein was simply what had been granted by patent and could not be reviewed here.

3. The effect of the compromise and deed was purely a question of construction of a contract and can never in any manner involve either a right under the law of the United States or the Constitution, or in any other thing which could be reviewed by this court.

BRIEF.

The jurisdiction of this court must depend upon the complaint. The review of the facts above stated shows that the complaint was simply trespass. The answer alleged no affirmative defense, except that of estoppel by deed and contract. The jurisdiction of the United States Court was originally obtained solely by reason of the allegation that the plaintiff was a citizen of the State and the defendant an alien. The

complaint did not hint at any other ground of jurisdiction and the answer did not affirm any.

The cases decided by this court are so recent that it is hardly necessary to quote from them. The leading case is that of Colorado Central Mining Co. vs. Turck, 150 U. S., 143, where the Court quotes from the opinion of the court in Metcalf vs. Watertown, 128 U. S., 588. The writ was dismissed upon the ground, as the court said:

"The jurisdiction of the Circuit Court was invoked, December 2, 1885, by filing of the complaint, from which it appeared that the suit was one of which cognizance could be properly taken on the ground of diverse citizenship, but it did not appear therefrom that jurisdiction was rested, or could be asserted, on any other ground. The federal question now suggested did not emerge until the defendant set up its second defence, and not then unless deducible from the bare averment that it claimed under the senior discovery and patent, which was admitted in the replication."

This was followed by the case of Borgmeyer vs. Idler, 159 U. S., 414, in which the court quotes the language of the Turck case.

In the case of Ex Parte Jones, 164 U. S., 691, the court again repeated the same rule, as follows:

"In this case the original bill averred the complainant to be a citizen of Pennsylvania and the defendant to be a national bank, duly established under the laws of the United States, having its place of business at Boston, and a citizen of the State of Massachusetts. As the bill was filed after the

Act of 1888 took effect, it must be deemed to be a suit dependent upon citizenship alone. But even if another ground were developed in the course of the proceedings, the judgement of the Court of Appeals would be final if the jurisdiction of the Circuit Court were originally invoked solely upon the ground of citizenship. Colorado Central Mining Co. vs. Turck, 150 U. S., 138; Borgmyer vs. Idler, 156 U. S., 408."

In 3d St. Ry. Co. vs. Lewis, 173 U. S., 457, the court say:

"It is thoroughly settled that under the act of August 13, 1888, c. 866, 25 St. 434, the Circuit Court of the United States has no jurisdiction, either original or by removal from a state court, of a suit as one arising under the constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement to be a necessary part of his claim. Tennessee vs. Union and Planters' Bank, 152 U. S., 454; Metcalf vs. Watertown, 128 U. S., 586, 589; Colorado Central Mining Co. vs. Turck, 150 U. S., 138. If it does not appear at the outset that the suit is one of which the Circuit Court at the time its jurisdiction is invoked could properly take cognizance, the suit must be dismissed; and lack of jurisdiction cannot be supplied by anything set up by way of defence. And so when jurisdiction originally depends on diverse citizenship, the decree of the Circuit Court of Appeals is final, though another ground of jurisdiction may be developed in the course of the proceedings."

"Unless that appears by the plaintiff's statement to be a necessary part of his claim." What can that mean as applied to this case where it does appear that no question arose by

the complaint itself, but the jurisdiction was invoked solely on the ground of citizenship? No question arose by the answer, no question arose in the trial court; this entire record, from one end to the other, did not raise before the trial court any question exclusively federal in its nature. The issue discussed and argued on the trial was solely as to the effect of the contract and deed of the thirty-foot strip. Did that provide for vertical lines or lines parallel to the dip of the vein, or what was the construction of it? Those were the questions involved in the instructions of the court and requests to charge and arguments of counsel. There surely can be no federal question arising out of it. The right to follow the vein upon its dip underneath the surface ground of defendant was one that was given by a grant of the patent and was as much a part of the patent as a description of the land. This court cannot acquire jurisdiction to determine the extent of every patent of the United States. If that were the rule, every title to the lands which came by patent, and all titles in the western states did, would involve federal questions. It has been the constant rule of this court, through all the years of its organization, that the mere construction of a patent to the lands of the United States does not give jurisdiction to the United States court. De Lamars N. G. M. Co. vs. Nesbitt, 177 U. S., 525-527. Does it change it in any manner—that the nature of this patent is such that it would depend upon proof where the vein would extend? The mere fact that a right is acquired by the law of the United States does not give this court jurisdiction. That has been recently determined in the adverse claim cases, and one carefully considered so recently by this court.

Shoshone M. Co. vs. Rutter, 177 U. S., 505.
Blackburn vs. Portland G. Co., 175 U. S., 571.
Lowry vs. Silver City G. & S. Co., 179 U. S., 196.
Florida Central Railroad vs. Bell, 176 U. S., 321.

The assignment of errors, of the present plaintiff in error, which was prepared for it by the Circuit Court of Appeals, does not show any of the questions to be involved which are now claimed in their petition for error. The assignment of errors is found in the record, pp. 49-53, seventeen assignments in all. The first one is the only one from which it could be pretended that any of the questions now raised by the petition in error was involved. That assignment was upon an objection that the complaint did not state facts sufficient to constitute a cause of action. Why is not shown.

Moreover, the allegation of ownership is sufficient. The real ground of the demurrer actually urged was that the complaint was indefinite and uncertain by reason of the expression 'parallel end lines.' The provision of the Montana Code cited below, that although a demurrer may be interposed to a complaint upon the ground of uncertainty or that it is indefinite, still if the demurrer is not interposed on that ground, the same will be waived.

"See Sections 680 and 685 of the Code of Civil Procedure, hereinbelow given in full."

At page 16, folio 33, is to be found the action of the court consisted simply of the ruling of the court upon the general objection that the complaint did not state facts sufficient to constitute a cause of action, and which was overruled. And, to raise a federal question, the defendant in

that trial should have stated distinctly what federal question was involved and how. The other assignments relate to questions of evidence and methods of deraigning title. The plaintiff claimed to deraign its title by a discovery upon the St. Louis vein, and that it thereby acquired title to all other veins so far as the apex was within the premises; that the direction of the end lines was determined by the position of the St. Louis vein and not by the direction or position of the extra or other veins.

The plaintiff in its complaint had alleged that it was the owner of the vein in question. The defendant contended at great length, and nearly all the assignments of error in the Circuit Court of Appeals are to the effect that that allegation was not sufficient, and that the plaintiff should say why it was the owner and by what method it acquired title to the Drum Lummon vein. In other words, it must plead evidence of its title, to-wit: the discovery of the St. Louis vein, that it crossed the end lines of the St. Louis claim, that it dipped in the same direction as the Drum Lummon vein and that the Drum Lummon vein was an extra vein under the Statute. The plaintiff contended that the simple allegation of ownership was sufficient. That was a question of the construction of a practice act of the State of Montana, nothing else. What form the plaintiff takes in an action of ejectment depends entirely upon the law of the states, the United States Court simply following the state practice. That question of form of pleading cannot be reviewed in this court surely. Yet in the original assignments of error that is involved in the 2, 3, 4, 6, 7, 9 and 16 assignments. The effect of the compromise contract and

the compromise deed was the subject of nearly all the rest of the assignments of error, that is, the 5, 7, 11 and 12 assignments of error. The other questions involved in the assignments of error were questions of evidence not involving the construction of any statute. One as to whether plaintiff had the right to prove that defendant had entered upon the 400-foot level although it had not extracted ore therefrom, a question purely of evidence by the court. Another, the effect of defendant having taken out ore which it had not sold, but left piled up to go to waste.

These questions present nothing at all in the way of rights under the construction of the United States law or under the Constitution of the United States. It is by the petition in error, page 68, folio 133, that the plaintiff in error first attempts to raise these federal questions. It is there that we first hear that the court erred in holding that a vein (folio 134 "c") which enters and departs through the same side line of a claim has or can have extralateral rights under the laws of the United States.

For reasons which we have urged above we think it was not a federal question if it had been raised by the answer and insisted upon at the trial and determined at every stage of the procedure, but it never was raised by the answer, it was not raised upon the trial; it is only as the plaintiff in error heard of it incidentally through the dissenting opinion of one of the Circuit Court Judges, that it is first raised and now suggested in the way of a petition.

In addition to that which has been said above, we submit the following in support of our position that the complaint

does not show any "Federal Question", any "controversy between the parties in regard to the operation and effect of any law of the United States."

The action was commenced in the Circuit Court of the United States,—it was not commenced in a State court and removed to the Circuit Court. Therefore, as stated above, we must go to the complaint itself, and to no other pleading or paper, in order to ascertain the ground upon which the jurisdiction of the United States Court is based.

See Colorado Central M. Co. vs. Turck, 150 U, S., 138-143.

Turning, then, to the complaint, and confining ourselves to that pleading alone, we respectfully submit that it does not show a Federal Question, or any controversy concerning any law of the United States, as such Question or controversy must be stated, under the cases decided in this court.

See *Ex Parte* Smith, 94 U. S., 455.

That case was brought to recover possession of certain lands which the relators claimed under the Revenue Laws of the United States; that was the sole ground upon which jurisdiction was claimed. The court says: "In this case the jurisdiction is claimed on account of the subject-matter of the action, and not on account of the citizenship of the parties. It was incumbent upon the relators to show, in their pleadings or otherwise, that this action arose under the revenue laws of the United States. This they failed to do. They do show that they claimed title through such laws, but not that their title in that respect is disputed. For all that appears, Ander-

son may admit their title, and still contest their right to possession as against him. He may be their tenant, or he may be their grantee. There are no presumptions in favor of the jurisdiction of the courts of the United States." And it was held that the case was properly dismissed.

So in this case: It is true that defendant in error, in its complaint did show that it claimed title through the laws of the United States, but the complaint does not show that its title was in any manner disputed; from all that appears from the complaint, the plaintiff in error may have at all times admitted the title so asserted; may have been our tenant; may have claimed (in fact did claim in its answer, see paragraph 111 of answer, page 7) to be the grantee of the defendant in error; from all that appears from the complaint, the defendant below (plaintiff in error) may have denied the trespass—in fact, it does so deny (see paragraph II of answer, page 7). All of these questions are questions of fact, and the rights of the parties do not necessarily depend upon the construction of any statute of the United States (See cases cited above).

To the same effect is the following case:

Gold Washing & Water Co. vs. Keyes, 96 U. S., 199.

That case had been commenced in the State Court; and the defendant (plaintiff in error) sought to have the same removed on the ground of a Federal Question. The petition set out in full the title of defendant to two placer mining claims, which they claimed under the laws of the United States; and alleged that the determination of the case would necessarily involve and require the construction of certain

laws of the United States. The Court say: "The statutes referred to contain many provisions; but the particular provision relied upon is nowhere indicated. A cause cannot be removed from a State Court simply because, in the progress of the litigation, it may become necessary to give a construction to the constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved."

Sections of Montana Code of Civil Procedure referred to above:

"The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either:

Section 680:

"1. That the court has no jurisdiction of the person of the defendant, or the subject of the action.

"2. That the plaintiff has not legal capacity to sue; or,

"3. That there is another action pending between the same parties for the same cause; or,

"4. That there is a defect or misjoinder of parties plaintiff or defendant; or,

"5. That causes of action have been improperly united; or,

"6. That the complaint does not state facts sufficient to constitute a cause of action; or,

"7. That the complaint is ambiguous, unintelligible, or uncertain."

Code of Civil Procedure, Section 685:

"If no objection is taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

We respectfully submit that this appeal should be dismissed, and the judgment should be affirmed.

Ed O. Toole
Thos. C. Bach
Arthur Brown
J. H. P. Henderson

Counsel for Defendant in Error.

No. 214.

FILED
DEC 9 1901
JAMES H. McKENNEY
Clerk

Brf. of Toole, Bach, Bryant
Henderson for D. C. (on mo

In the Supreme Court

Filed Dec. 9, 1901.

United States.

OCTOBER TERM, 1901.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error.

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

No. 211.

NOTICE OF MOTION AND MOTION TO DISMISS.

E. W. TOOLE,
THOS. C. BACH,
ARTHUR BROWN,
H. P. HENDERSON,
Counsel for Defendant in Error.

H. S. Tharbet & Co., Printers, Helena, Mont.

2474

In the Supreme Court
OF THE
United States.

OCTOBER TERM, 1901.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error.

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

No. 214.

To Messrs. Charles J. Hughes, W. E. Cullen and E. C. Day, *Counsel for Appellants:*

Gentlemen: Please take notice that on Monday, the 30th day of December, 1901, at the opening of Court, or as soon thereafter as counsel can be heard, the motions, of which a copy is herewith served upon you, will be submitted to the Supreme Court of the United States for the decision of the Court thereon. Annexed is a copy of the brief of argument to be submitted with the motions in support thereof.

E. W. Toole
Thos. C. Bach
Arthur Power
H. P. Henderson

Counsel for the Defendant in Error.

Due and timely service of the foregoing notice and of the following motions to dismiss the appeal herein and affirm the judgment, and receipt of a copy thereof, on this .....31st.....day of November, 1901, is hereby admitted.

Dated: November 31, 1901.

Chas. J. Hughes
W. E. Cullen E. C. Day

Counsel for Plaintiff in Error.

Copy

In the Supreme Court

OF THE

United States.

OCTOBER TERM, 1901.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error.

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

No. 214.

Comes now the defendant in error by E. W. Toole, Thomas C. Bach, Arthur Brown and H. P. Henderson, its attorneys appearing in its behalf, and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction :

1. Because no judgment has been rendered in this case against the plaintiff in error, but the action of the Circuit Court of Appeals was simply to grant a new trial upon certain issues, and no review can be had in this court until final judgment has been rendered.

2. Because the case is not one provided for by the

statute where a writ of error will lie to review an action of the Circuit Court of Appeals.

3. No federal question was involved or any right under the laws of the United States. No question of the constitutionality of the law of any State or of the United States, nor was there any question of the construction of the Constitution decided by the Circuit Court of Appeals.

DATED: Nov. 30, 1911

E. W. Earle

Thos. C. Back

Arthur Brown

H. P. Henderson

Attorneys for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

(No. 214.)

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF FACTS.

This case is the companion to No. 213, and is a review of a portion of the same judgment rendered in the trial court at Helena.

The complaint in the original action was one for trespass committed upon a vein alleged to belong to the plaintiff. The action for trespass described two sections of the vein, one lying north of the 108-foot plane, and one between the 108 and 133-foot plane, a section twenty-five feet in length along the vein, alleging that said vein dipped underneath the property of defendant, the Nine Hour claim. Although not in separate counts, the complaint described these two sections separately so that the effect was the same as if there had been two counts, one of the trespasses north of the 108 foot-plane and the other for trespass upon the twenty-five feet. The answer was the same to each, to-wit: A general denial

and an affirmative defense that the plaintiff had granted by contract to secure its patent and afterwards by deed enforced, by decree of the court, a thirty-foot strip along a portion of its side line (See diagram, page 50, thirty-foot strip A-E and D-C). On the trial the court held that plaintiff could not recover for the 25-foot section between the said two planes, but held that it could recover northerly of the 108-foot plane. A verdict was rendered in favor of plaintiff northerly of that plane, and in favor of defendant as to the twenty-five feet, thus each party was defeated in some part of its contention. Each party procured the settlement of a Bill of Exceptions in the same case. The defendant sued out its writ of error and brought the case to hearing, reported in the decision against it, before the Circuit Court of Appeals (102 Federal, 430). Subsequently and while the first writ of error was pending, the plaintiff, defendant in error, sued out a writ of error which was reviewed by the Circuit Court of Appeals, as appears by the decision in this case, (104 Federal, 664). In the second review, that taken by the plaintiff, the court simply granted a new trial, which has not yet been heard. Before the remittitur could issue and the trial be had in the circuit court this writ of error had been sued out. Defendant in error now claims, for ground of dismissal, the same as in No. 213, to-wit:

1. That the suit having been brought on the ground that the plaintiff was a citizen of Montana and the defendant an alien, and for no other reason, and no federal question having been raised by the answer, the decision of the Circuit Court of Appeals became final under the statute and cannot be reviewed here.

2. That the right to recover upon the vein was simply what had been granted by patent and could not be reviewed here.

3. The effect of the compromise deed was purely a question of construction of a contract and can never in any manner involve either a right under the law of the United States or the Constitution or any other thing which could be reviewed by this court.

4. And also this defendant in error says that this court will not review a decision which simply grants a new trial. It does not yet appear that defendant, plaintiff in error, is or will be aggrieved,—it is not injured until judgment is rendered.

BRIEF.

On the subjects involved in No. 213 we submit the same brief without repeating it here.

On the subject that an order granting a new trial is not reviewable by a writ of error we refer to the following cases of this court:

Grant vs. Insurance Co., 106 U. S., 429.

Bostwick vs. Brinkerhoff, 106 U. S., 3.

If the judgment is not one which disposes of the whole case on its merits, it is not final. Consequently it has been uniformly held that a judgment of reversal with leave for further proceedings in the court below cannot be brought here on writ of error.

Brown vs. Union Bank, 4 How., 465.

Pepper vs. Dunlap, 5 id., 51.

Tracy vs. Holcomb, 24 id., 426.

Moore vs. Robbins, 18 Wall., 588.

McComb vs. Knox County, 91 U. S., 1.

Baker vs. White, 92 id., 176.

Davis vs. Crouch, 94 id., 514.

Railway Co. vs. Swasey, 23 Wall., 405.

The Palmyra, 10 Wheaton, 502.

St. Louis, Iron Mt. & Southern Ry. Co. vs. Express Co., 108 U. S., 24.

Perkins vs. Fourniquet et al., 6 Howard, 206.

Postal Telegraph Cable Co. vs. Southern Ry. Co., 90 Fed., 211.

Though the merits of the cause have been substantially decided while anything, though formal, remains to be done, this court cannot pass on the subject.

Insurance Co. vs. Adams, 9 Pet., 591.

There was something much more than formality in this case; there is a judgment to be had against this defendant, plaintiff in error, before it has a right to complain.

E. W. Earle,
Thos. C. Back
Arthur P. Brown
A. P. Henderson

Counsel for Defendant in Error.

Nos. 213 and 214.

FILED
MAR 12 1902
JAMES H. McKENNEY,
Clerk.

In the Supreme Court

Brf. of Brown & Henderson.

OF THE

United States.

Back for O. C.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

Filed Mar. 12, 1902.

No. 213.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

No. 214

BRIEF FOR DEFENDANT IN ERROR.

ARTHUR BROWN,
H. P. HENDERSON,
E. W. TOOLE,
THOS. C. BACH,

ATTORNEYS FOR DEFENDANT IN ERROR.

H. S. Thurber & Co., Printers, Helena, Mont.

In the Supreme Court

OF THE

United States.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.
No. 213.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.
No. 214

BRIEF FOR DEFENDANT IN ERROR.

Following the plaintiff, we unite the briefs in the two cases—Nos. 213 and 214; it must be remembered, however, that the same points are not involved. In case 214, the St. Louis Mining Company was Plaintiff in Error, and consequently none of the exceptions taken by the Montana Mining Company are involved in the appeal in case No. 214;—in fact the only point involved in that appeal is the right of the St. Louis Company to follow the

dip of the vein, known as the Drum Lummon vein, between the planes known as the 108 and 133 foot planes.

CASE NO. 213.

A map of the premises in controversy is attached to our motion to dismiss the appeal in case No. 213. This map shows the hanging wall as described both in the complaint and in the evidence; the foot wall is shown as described in the evidence of the witness Jenny; his evidence in that regard was stricken from the record, but it is found on p. 21 of the record in case No. 214, and the granting of the motion to strike was one of the exceptions taken by the St. Louis Company in that case.

However, it will be seen from the complaint that, although the two points at which the two walls of the vein left the St. Louis ground at its southerly end, the points of departure at the northerly end are not given—but it does appear from the record that the entire apex continues in the St. Louis ground for some distance north of the plane known as the 520 foot plane. We mention this, because a map filed by Plaintiff in Error in one of its briefs, is not correct at the northerly end thereof.

This is a writ of error to the Circuit Court of Appeals. Defendant in Error was plaintiff below and brought suit for trespass and conversion of ore taen from its mine by the defendant. Plaintiff owned the St. Louis Mining Claim and defendant the Nine Hour Mining Claim, lying side by side. The mine of the plaintiff, (Defendant in Error) the St. Louis, was patented prior to the issuance of the

patent to the Nine Hour. The St. Louis was the older claim of the two; located before the Nine Hour was located; and the notice of its location was recorded prior to the recording of the notice of location of the Nine Hour. (See Record, p. 3). At the time of applying for patent by the St. Louis the surveyor included a portion of the premises claimed by the owners of the Nine Hour. An adverse claim was made by the owners of the Nine Hour and suit was brought thereon. To prevent the delay caused by that suit and to compromise the same the superintendent of the St. Louis made a contract to convey the premises claimed by the Nine Hour back to the owners of the Nine Hour as a part of the Nine Hour claim. (Contract Record page 36.) The St. Louis obtained its patent and neglected and refused to convey. Suit was brought upon the contract to convey for specific performance. The suit was not brought by the assignees of the contract as such, but by the owners of the Nine Hour claiming that the contract was appurtenant and a part of the Nine Hour claim. (See Finding 8, page 42, and Finding 5, page 41.)

In the complaint the owners of the Nine Hour claim allege:

That the said contract was made on the 7th day of March, 1884, "to settle and compromise said suit and adverse claim and for the purpose of settling and agreeing upon the boundary line of the said Nine Hour Lode Mining Claim and the said St. Louis Mining Claim." Record 34. The suit for the specific performance was determined

in favor of the owners of the Nine Hour claim in the State Court of Montana. As a condition of an appeal under the law of that state, the defendant in that case, plaintiff in this, Defendant in Error here, was required to execute and deposit with the clerk, a deed, the form of which was prescribed by the decree, record 43. This was accordingly done, and is found in the record, p. 10. It appears by this record that the entire premises heretofore claimed by the Nine Hour owners was thus deeded back to them and not any less part of it. There is nothing in this record tending to show that in making this compromise,

> "The purchasers in the interest of the plaintiff in error were surrendering a large part of the Nine Hour claim and accepting therefor an insignificant fraction that was justly their due," as contended by plaintiff in error in its brief in the Circuit Court of Appeals.

Developments have shown that within the St. Louis claim are two veins, one, the discovery vein, running substantially through the St. Louis claim from end to end, northerly and southerly, and dipping easterly, and that there is another vein, called in the record some times the "Drum Lummon" vein, some times the "Extra," some times the "Ancillary" and sometimes the "By Vein." This vein apexes for a long distance within the St. Louis mining claim and dips also easterly underneath the Nine Hour Mining Claim. A part of this vein, the apex of

which is wholly within the St. Louis, dips underneath the premises conveyed by the St. Louis above described to the Nine Hour, which premises are described herein, both in the complaint and in the general argument by way of convenience as the "Compromise Ground." So that we have the question presented as to the ownership of the ores lying underneath the premises so conveyed and called the "Compromise Ground," but the apex of which and the apex of the vein carrying the ore lies within and entirely within the St. Louis Claim. Under the description in the complaint the vein departs from the St. Louis claim into the Nine Hour claim at a southerly part thereof, and in the course of its departure the width of the vein is alleged to be twenty-five feet and carries the apex partly on the strike and partly on the dip. The court below awarded to the plaintiff the ores lying within the vein, the apex of which was wholly and entirely within the St. Louis Mining Claim. The court denied to the plaintiff any right to those ores lying within that part of the vein included within the width of the vein, the said twenty-five feet, although the St. Louis was the older claim.

Under these facts the defendant contended that the St. Louis had no right to any ores belonging to St. Louis claim apexing therein which did dip underneath the premises conveyed known as the "Compromise Ground." This constitutes the principal controversy in the case. The plaintiff insisted that the circumstances under which the deed was executed and delivered should be construed

as a part of it and the court ruled for the plaintiff. That is, that the original contract should be introduced and the record of the suit brought thereon, both as showing the circumstances under which the deed was executed and delivered, and aiding in its construction. This is a branch of the same principal question. It all turns upon the construction of that deed and the propriety of the admission of this evidence to this main issue.

Plaintiff in error made various and sundry objections of minor import which are discussed in the brief and of course will have to be answered by the defendant in error, such as to the admissibility of the evidence under the complaint of the location of the discovery vein. The plaintiff in its complaint had alleged that it was the owner of all the veins apexing within the St. Louis claim. To prove that ownership it proved the fact that the apex was within the claim, the direction and angle of its dip and that the discovery vein had the same direction and substantially the same angle and that the discovery vein extended from end line to end line of the mining claim.

The plaintiff in error contends in his brief that this particular fact tending to show the ownership must be specifically alleged. Defendant in error claims that the general allegation of the ownership is sufficient allegation to admit proof of any part of its title.

Some questions are involved as to the measure of damages. The plaintiff in error contends that certain ores

were enjoined from sale and therefore it has kept them ready to be delivered as ordered by the court in another suit. No evidence is shown where the ores are, or in what condition or what became of them. Part had been milled by defendant (Record page 30) and some have been mixed with waste and other material by plaintiff in error. (See p. 31 Cross-ex. of Burrill, superintendent of plaintiff in error and its witness). Plaintiff proved that they had been wrongfully extracted from the premises in question and their value. No tender has ever been made of these ores or their value and no acceptance of them. What had not been milled had been wasted. (Record p. 30.)

If the plaintiff in error is serious in its contention that this is a mitigation of damages the question is here presented, whether taking the ores and secreting them would be any defense in an action of trespass or trover. The request to instruct by defendant did not conform to the fact proven.

But the principal question in the whole controversy depends upon the first great issue. In executing the deed of the compromise ground under the circumstances did the deed convey vertical lines or did it convey simply the surface and such veins as had their apex therein, wholly or in part? Did that deed convey any part of the St. Louis claim or was it simply an admission as alleged in the complaint of the Montana Mining Company, Limited, that it was a conveyance of a part of the Nine Hour claim, making these claims stand before the court as if

the survey had originally been made not to include this compromise ground?

The complaint contains such a description of the St. Louis Mining Claim by metes and bounds and courses that it can be readily drawn, or a map made thereof, and it is as follows (See pp. 2 and 3):

Beginning for the description of lots Nos. 54 and 55 A, at corner No. 1, a granite stone 16 x 12 x 12 inches, marked '1 M. C. 54,' a mound of stone alongside, from which the quarter section corner on south boundary of section 36, in township 12 north of range 6 west of the principal meridian, bears south 74 degrees and 15 minutes east 353 feet distant.

Thence, first course, magnetic variation 19 degrees east, south 21 degrees and 15 minutes west, 102 feet, intersect line between townships 11 and 12 north of range 6 west, a granite stone 15 x 14 x 12 inches, marked '54 M. C. 55 A,' 450 feet to a point from which a shaft bears north 67 degrees, west 285 feet distant, and from said shaft an open cut, 3 by 5 feet, 100 feet long, runs south 54 degrees east; 655 feet to a point from which a shaft bears west 153 ft. distant 1097 ft. to corner No. 2, a slate stone 20 x 12 x 5 inches, marked '2 M. C. 55 A,' a mound of stones alongside, from which the center of discovery shaft bears north 35 degrees 30 minutes west 289 feet distant.

Thence, second course, magnetic variation 19 degrees east, south 51 degrees 30 minutes west, 403 feet to corner

No. 3, a slate stone 14 x 10 x 4 inches, marked '3 M. C. 55 A,' a mound of stones alongside, from which the south-east location corner bears south 10 degrees east 435 feet distant.

Thence, third course, magnetic variation 19 degrees east, north 45 degrees 30 minutes west, 600 feet to corner No. 4, a granite stone 20 x 9 x 7 inches, marked '4 M. C. 55 A,' a mound of stones alongside, from which the south-west location corner bears south 79 degrees west 182 feet distant.

Thence, fourth course, magnetic variation 18 degrees east, north 51 degrees 15 minutes east 425 feet to corner No. 5, a granite stone 16 x 12 x 6 inches, marked '5 M. C. 55 A,' a mound of stones alongside.

Thence, fifth course, magnetic variation 19 degrees east, north 21 degrees, 45 minutes east, 529 7-10 feet distant, intersects said township line, a granite stone 18 x 16 x 7 inches marked "54 A 54 M. C." 1069 feet to corner No. 6, a granite stone 18 x 12 x 6 inches marked "6 M. C. 54 A." from which a fir tree 13 inches in diameter marked "6 M. C. 54 B. T." bears north 15 degrees, east 24 feet distance, and a pine tree 5 inches in diameter, marked "C. M. C. 54 B. T." bears south 54 degrees, east 21 5-10 feet distance.

Thence, sixth course, magnetic variation 19 degrees east, south 45 degrees 30 minutes, east 515 5-10 feet to corner No. 1 of Lot No. 40, the Drumlummon Lode Claim, 579 feet to corner No. 1, the place of beginning; said

lots Nos. 54 and 55 A extending 1500 feet in length along said St. Louis vein or lode, the granted premises in said lot containing 18 acres and ninety-three hundredths of an acre.

It also contains (see page 3) such a description of the thirty foot strip or compromise ground that the same could be readily laid off on the ground enclosed within the above description, and it is shown to be that portion of the premises included within the exterior limits of the St. Louis claim described as follows:

Commencing at a point on the east side line of the St. Louis Mining Claim 60.5 feet in a northerly direction from corner No. 2; thence in a southerly direction along said line between corners Nos. 1 and 2 to corner No. 2; thence along the line between corners 2 and 3 to corner No. 3; thence along the southerly line of the St. Louis lode thirty feet; thence in a northerly direction and on a line parallel to the line between corners 2 and 3, 230 feet to the point of beginning.

Making a drawing of the St. Louis Lode Claim and the thirty foot strip from the description given in the evidence we have a figure as found in themap filed with and in our motion to dismiss the appeal in this case.

In this description that portion of the description given in the complaint which fixes the point of beginning is not given, because with the tracing of the St. Louis claim the fixing of the point of beginning is not difficult.

The complaint also alleges (see pages 1 and 2) that the

plaintiff at the times mentioned in the complaint "was and now is, the owner of, entitled to, and in the actual possession and occupation" not only of the St. Louis Quartz Lode Mining Claim, but also "of the quartz, rock and ore and precious metals contained in any and all veins, lodes and ledges of mineral-bearing rock through their entire depth, the tops or apexes of which lie within the surface lines of the said fractional portion of said St. Louis Lode Mining Claim, although such veins, lodes or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side line of the surface of the said St. Louis Quartz Lode Mining Claim," and this allegation is admitted by the answer of the defendant (see page 7, paragraph 1).

It is also alleged that the St. Louis Mining Claim was discovered, located and recorded prior to the discovery and location and recordation of the Nine Hour Lode Mining Claim and that the patent to the St. Louis Mining Claim was issued prior to the patent to the Nine Hour Lode Mining Claim (paragraph 3 of complaint, p. 3), and this is admitted by paragraph 1 of the answer, page 13 of the record.

One of the veins which we have thus alleged that we are the owners of, and which has a portion of its top or apex within the St. Louis Lode Mining Claim as alleged in the paragraph heretofore quoted, is then described so that it is shown that the hanging wall crosses the east side line of the St. Louis claim between corners Nos. 1 and 2 and at a point not more than 520 feet

south of corner No. 1, and traveling in a southerly direction it remains wholly in the St. Louis ground until it again crosses the east side line of the St. Louis claim of which the west boundary line of the thirty foot strip is a part at a point 108 feet from the point at which the said west line of the thirty foot strip intersects the line between corners Nos. 1 and 2 of the St. Louis claim.

It is also shown that this vein dips to the east and consequently the foot wall must line westerly of the hanging wall, and that the foot wall crosses the line last above described at a point 25 feet south of the point at which the hanging wall crosses said line. The general course of this vein is also shown on the plat which we have inserted in this brief, and the same is inserted there by means of the description contained in the complaint, (See pages 3 and 4), and from the evidence of the witness Jenny. The east line is described to be the east side line. The planes are also described, so that it would appear from the face of the complaint that the portion from which the ore was taken is from that portion of the vein which, on the dip, is entirely within the end lines of the St. Louis claim.

It also appears from the admission made by the replication that the execution and delivery of the deed mentioned in the answer was made under these circumstances: that the predecessor in interest of the defendant having applied for a patent to the St. Louis Mining Claim included in his said application the premises

known as the thirty foot strip or compromise ground; that thereupon the predecessor in interest of the plaintiff in error filed an adverse claim, and an action was brought by the predecessor of the plaintiff in error against the predecessor of the defendant in error to determine the right of possession to the said thirty foot strip; that thereupon an agreement was made by which the predecessor in interest of the defendant in error agreed to convey said strip to the predecessor in interest of the plaintiff in error; that afterwards an action was brought by the plaintiff in error as plaintiff against the defendant in error and Charles Mayger, one of its predecessors, for the purpose of compelling the defendant in error to execute and deliver to the plaintiff in error a deed of the said premises known as the thirty foot strip or compromise ground, and that in said action it was found and determined by the court, as a matter of fact, that the said thirty foot strip or compromise ground was at all times a part of the said Nine Hour Lode Claim, and was by the parties to the bond or agreement to convey agreed to be a part thereof, and that the agreement to convey was made and given for the purpose of settling and determining and fixing the boundary line between the said Nine Hour Lode Mining Claim and the St. Louis Lode Mining Claim, the boundaries of which claims had been and were at the time of the execution of the agreement to convey in conflict, and that the deed mentioned in the complaint was the deed executed and delivered in accordance with the judgment of the court based upon said

finding (see replication, pp. 12 to 14), and this further appears in the proof, pages 32 to 45.

There were several different blocks of ore removed by plaintiff in error from the portion of the vein described, known as Nos. 8, 9, 10, 11, and it appears from the evidence in the case, and especially from the maps, that the ore known as block No. 10 was a part of the vein, the entire apex of which was within the St. Louis ground proper, and on that portion of the dip of the vein which is easterly of the perpendicular plane drawn through the easterly side line of the compromise ground, being a portion of the dip of the vein between the planes known as the 108 foot and the 133 foot planes, but not included between that section of the earth bounded by perpendicular planes through the boundary lines of the said thirty foot strip or compromise ground, but lying easterly of the east side line of the said strip projected vertically downward.

It will appear from the evidence that the 400 foot level has been run by the defendant company, plaintiff in error, through that portion of the dip of the vein in question, no portion of which was included in the thirty foot strip or compromise ground, and which was wholly within perpendicular planes passed through the end lines of the St. Louis claim.

It appears from the record also that in the opening of its case the defendant in error herein offered in evidence the papers mentioned in Assignment 10 of Error, and that the plaintiff in error objected to the same upon the

following grounds: because it was not the proper time to offer the same (see page 19.)

It appears further in evidence that plaintiff in error milled forty or fifty tons of the ore which it had taken out from the vein as alleged in the complaint and as shown at the trial. (See p. 30.)

It will also appear that the plaintiff in error mixed a portion of the ore by it taken from the premises belonging to the defendant in error with other ores or waste belonging to the plaintiff in error (see pp. 30 and 31).

It appears from the evidence that only a portion of the vein in controversy between the plane known as the 520 foot plane and the plane known as the 108 foot plane did, on its dip, pass under or within the premises known as the thirty foot strip or compromise ground (see plaintiff's exhibit 1).

It will also appear from the record that the assignment of error No. XVII, which is instruction No. 2, was excepted to by the plaintiff in error in writing and the exception is as follows: 'To the giving of which said instruction the defendant then and there objected for the reason that there was no evidence that the defendant had prevented the plaintiff from ascertaining the true value of any of the ore, and that said instruction was misleading to the jury, and does not correctly state the law applicable to the case therein,' (See p. 47).

It appears from the testimony of the witness Mayger (p. 17) and that of the witness Parks (pp. 20 and 21) and

that of the witness Jenney (pp. 23 and 24) that the discovery vein of the St. Louis claim runs lengthwise with the claim as located, that it is developed in a southerly direction to within about ninety-five feet of the south end of the claim as located, and the said witnesses further testified that, in their opinion, it runs out of the north end of the claim and also out of the south end of the claim.

ARGUMENT.

Counsel for plaintiff in error in their brief in the Circuit Court of Appeals grouped together assignments of error Nos. 1, 2, 3, 4, 6, 9 and 16, and we will answer them in the same way. No. 1 refers to the sufficiency of the complaint, No. 2 is to the effect that it was error to admit evidence that the discovery vein ran with the length of the claim: No. 3 was a general objection to any evidence as to the discovery vein; No. 4 was to the evidence showing that the several planes known as the 520, 108 and 133 foot planes were parallel to the end lines as shown in the patent; No. 6 and No. 9 were an objection to evidence tending to show that the discovery vein ran parallel to the side lines substantially from end line to end line and No. 16 was an instruction to the effect that the evidence shows that the discovery vein of the St. Louis Claim extends substantially from one end line to the other. As to this last there was no evidence to the contrary, and we assume from this grouping that counsel

has no ground of objection except that this was not alleged in the complaint.

I.

The action is one of trespass on real estate and for damages resulting from the trespass. And the complaint in such an action would be similar to one in ejectment.

The practice in Montana is under what is known as the Code of Reformed practice, and the complaint must contain "A statement of the facts constituting the cause of action, in ordinary and concise language."

The facts referred to are ultimate facts; not the evidence upon which the ultimate facts are based; so in an action of ejectment, the complaint is sufficient if it states that the plaintiff at the time complained of was, and is the owner of the property and that the defendant prior to the commencement of the action ousted him therefrom.

McKay vs. McDougal, 19 Mont. 493.
Payne vs. Treadwell, 16 Cal. 221-244.

The complaint in that case alleged merely that the "plaintiffs are the owners in fee as tenants in common, and have the lawful right and entitled to the possession" of the described premises, and then further alleged the ouster.

See also Daly vs. Sorocco, 80 Cal. 367.
Johnson vs. Vance, 86 Cal. 128.

So inthis case all that was necessary to be alleged was

that, at the times complained of, the plaintiff was the owner of the property in question, and the facts constituting the trespass; these were the ultimate facts which follow evidence of anterior facts.

Counsel are quite correct in assuming that we do not say that "there is any special provision in the Code of Civil Procedure specially authorizing a plaintiff in an ejectment suit to simply allege ownership of the real property in controversy, in his complaint, and say that such allegation shall be sufficient." (See p. 41 of appellant's brief). Under no circumstances and in no jurisdiction would such an allegation state a cause of action against anyone. No wrong is alleged to have been done. But the allegation is sufficient to show title and ownership and to allow proof to sustain such ownership.

But we do most emphatically assert that, in every state in the Union having a practice act similar to ours, in an action for trespass either upon real or personal property, in an action of ejectment, in an action of trover, or of conversion, or of replevin, the plaintiff does not have to plead, that it is not proper practice to plead, his title; in that respect, his complaint is sufficient when it states that at the time complained of or at the time of the commencement of the action for ejectment, replevin, etc., he "is the owner of the property." That fact, that ultimate fact of ownership, he must prove at the trial, and he may prove this by presumptions which the law makes, or he may prove it by any other legal evidence of ownership.

In this case we have alleged that we are and were at the times complained of the owners of the St. Louis Quartz Mining Claim, "and of the quartz and precious metal contained in any and all veins through their entire depth, the tops or apexes of which lie within the surface lines of the said St. Louis Lode Mining Claim, although such veins may so far depart from a perpendicular in their downward course as to extend outside of the vertical side line, etc. (pp. 1 and 2). Then one of these veins is particularly described, and it is alleged that as to different portions of this vein, which portions are also particularly described as having "their top or apex within the St. Louis Mining Claim" and of which the plaintiff has already alleged ownership, and of one of which it again asserts ownership, as to this vein or portions thereof, it alleges the wrongs complained of, and the damage (pp. 3 and 4); it is also asserted that the St. Louis claim is a patented claim, and the description of the vein shows that these portions of the vein dip underneath the east side line of the claim, and into ground owned by the defendant which is a junior location, and that there the wrong was done.

The mere allegation of ownership is sufficient; but here is shown in the complaint a patented claim, with the presumption that the discovery vein runs lengthwise of the claim; here is a by-vein, which also runs lengthwise of the claim; here is a senior locator as against a junior locator, the latter of whom has taken ore from that portion of a vein which

has its apex within the senior location and is also within perpendicular planes passed through the end lines of the senior location—well within those planes—well within planes parallel to the end lines, the most northerly of which is 520 feet south of the north end line, and the most southerly of which is 270 feet north of the south end line. Every fact which constitutes our title is alleged: if counsel for defendant found anything indefinite in the complaint by reason of the expression "parallel end lines" or for any other reason, it was, as we have seen, their duty to demur to the complaint, and in that demurrer to specify wherein the complaint was indefinite.

However, the mere allegation of ownership is enough. See authorities cited below, in addition to those above cited.

The trouble seems to us to be that counsel confuse that which must be proved with that which must be alleged. We are led to this belief from the language which counsel quote: "Hands off, of any and every thingwithin my surface lines * * * until you prove you are upon * * a vein which has its apex within your surface claim".

His Honor, Judge Hawley, does not say "until you allege".

One of the main propositions in the contention of counsel is, that the allegations of the complaint are so repugnant in a material matter as to render it insufficient to support the judgment. To maintain this position it is contended that the allegation of title, possession and right of possession of defend-

ant in error, to the Saint Louis Lode Claim and of all veins, lodes or ledges having their apexes within the surface boundaries of the claim and all mineral contained in such veins, is utterly irreconcilable with the averment that plaintiff in error owns, possesses, and is entitled to possession of the Compromise Strip, as a part of the Nine Hour Lode claim, "together with all the mineral therein contained." To further elucidate this position, it is claimed that because the vein, lode or ledge containing the minerals for which judgment was recovered, dips under and beneath the surface of the Compromise Strip, it is nevertheless included in the exception of the Strip, by the pleading, because of the language, "together with all minerals therein contained," notwithstanding the vein, lode or ledge had its apex outside the Compromise Strip, and within the surface boundaries of the Saint Louis Lode claim.

The inwardness of the proposition is, that something is conceded by the pleading to belong to the Compromise Strip which did not belong to it as a part of the Nine Hour Lode claim under the laws of Congress, by importing into it the qualities of a title at common law. If it be true that "the mineral therein contained" is to be construed arbitrarily to mean all mineral beneath the surface of the Compromise Strip unlimited and unrestrained by the right of defendant in error to the minerals in the vein having its apex in the Saint Louis Lode claim, then there is repugnancy in the sense claimed by counsel for plaintiff in error. If the language, however, is to be con-

trolled by the Act of Congress in defining the right conveyed, and not the rules of the common law, then there is no repugnancy as asserted by counsel, and the allegations are made consistent and reconcilable.

It is undoubtedly true that the "words of a contract as stated in a declaration must have the same legal construction as they would in the contract itself," and this is the canon of interpretation relied upon by counsel of appellants, as was contended for in the court below. It logically follows that until the construction given the covenant, judgment and deed, comporting as it does with the allegations of the pleading, is reversed, no repugnancy can be said to exist. Hence the question is involved in the construction of the deed, and not the pleading, as it will stand or fall by such construction. It is conceded, as stated by counsel for plaintiff in error in a brief filed in the Circuit Court of Appeals, that "It is impossible not to perceive at the first glance that the language of the exception in the plaintiff's complaint was taken from the deed itself. It is a literal copy of the deed to that extent." Evidently the author of that plea did have in view the fact that the pleading would be construed in this respect as the contract would be construed, and that the best way to conform to the rules would be in adopting its language. Admitting all that has been said by counsel for plaintiff in error upon this point, and assuming that the doctrine announced is correct, it will have no application unless the words "together with all the mineral therein contained" are to re-

ceive a common law construction, instead of a construction under the Act of Congress, the common source of title of both plaintiff and defendant in error. The pleading interpreted under the latter, as applied to a quartz lode claim, or fractional part of it as such, is a model of perfection, and is supported by the interpretation of the deed made by this court, and harmonizes in all respects with the doctrine announced by the Supreme Court of the United States in Delmonte Mining and Milling Company vs. Last Chance Mining and Milling Company, 171 U. S., 55.

So long as it is maintained that the Saint Louis Lode claim is entitled to extra lateral rights to the portion of the vein apexing within the surface boundaries of that claim, and damages for the mineral extracted therefrom, so long must the complaint be upheld as a true and correct construction of the covenant, judgment and deed.

Assuming that the authorities cited by counsel are applicable to the complaint on account of the construction given the covenant, judgment and deed, they are of great importance in considering the effect to be given the answer upon the part of plaintiff in error. If the answer admits the title of defendant in error to the mineral in the vein, lode or ledge in question, in so far as it has its apex inside the surface boundaries of the Saint Louis Lode claim, notwithstanding its dip beneath the Compromise Strip, then the affirmative allegations of the answer must be reconciled with this admission, or else there is fatal repugnancy of a very malignant character.

"An affirmative allegation of the complaint which is not specifically denied, being admitted (Hill's Ann. Laws, 94), an affirmative allegation of the answer inconsistent therewith is properly stricken out."

Capital Lumber Co. vs. Learned et al., 36 Ore. 554.

The authorities cited by counsel concur in the proposition that the least can be said is that they would neutralize each other, and this would leave the allegation undenied. What, then, can be said where there is an express admission of an allegation of the complaint, as is the case here? In such case the new matter is rendered nugatory, and no issue is raised. Judged by the authorities cited by counsel for appellants and determined by the logic of the argument of their brief, how stands this matter under the complaint and answer? In so far as the vein, lode or ledge in question is concerned, it is expressly admitted that defendant in error is entitled to it, and to the ore and precious metals contained in it, in its dip beneath the Compromise Strip, and that is just what is involved. Paragraph II of the amended supplemental complaint reads:

"That at the times hereinafter mentioned, this plaintiff, as such corporation, was, and now is, the owner of, entitled to, and in the actual possession and occupation of that certain quartz lode mining claim known as the Saint Louis Quartz Lode Mining Claim, and of the quartz, rock and ore and precious minerals contained in any and all

veins, lodes and ledges of mineral bearing rock through their entire depth, the tops or apexes of which lie within the surface lines of said fractional portion of said Saint Louis Lode Mining Claim, although such veins, lodes or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side lines of the surface of the said Saint Louis Quartz Lode Mining Claim, which is situated in Ottawa Mining District, in the County of Lewis and Clarke, and State of Montana, and more particularly described as follows, to-wit:" See Record, pp. 2 and 3.

And the answer admits this. See paragraph 1.

Besides, if a more liberal view is taken of both complaint and answer, the construction given the covenant, judgment and deed in the complaint is correct, and that given them by the new matter in the answer is erroneous and may be disregarded. Plaintiff in error in its brief, filed in the court below, says "Allegations of fact by the pleadings repugnant to the correct construction of the contract may be disregarded," and at top of page 21 authorities are cited to support this proposition. They are applicable to the complaint, but under the admission of the fact that defendant in error was at the time of the alleged trespass, "and now is the owner of, entitled to, and in the actual possession and occupation" of the premises involved, as matter of pleading by force of the statute it becomes an admitted and incontrovertible fact.

The answer, page 13, Paragraph 1, reads: "It admits the allegations in paragraphs numbered 1, 2, and 3, of the said second amended and supplemental complaint."

Comment is unnecessary. If the new matter is consistent with the admission, there is no repugnancy. If it is inconsistent with it there is repugnancy and the admission prevails. And so it is: the claim of title under the covenant, judgment and deed to the minerals, admitted to belong to the defendant in error, leaves the allegations of the complaint undisputed, and the judgment should for that reason remain undisturbed. The only theory upon which it could be reconciled is that the plaintiff in error might have ore beneath the surface of its claim not contained in the vein, lead or ledge apexing in the Saint Louis Lode claim; but as to that defendant in error has brought no action, and it is in no way involved. The sum and substance of the estoppel sought to be pleaded is, that the title to the minerals in the vein apexing within the surface boundaries of the Saint Louis Lode claim has been conveyed by the deed to plaintiffs in error, and was and is on that account in plaintiffs in error, and not in defendant in error, in the face, as we have seen, of an express admission in the answer to the contrary.

We insist, therefore, that there was no issue to try under the pleadings, except as to the actual trespass and the damages, and that the claim of title by plaintiff in error under the covenant, judgment and deed is of no consequence under its theory of the pleadings. Whatever

may be the construction of these documents, no title has been asserted under them.

We have dwelt at some length upon this subdivision of our brief, because it not only answers counsel's contention as to the sufficiency of the complaint, but it answers also their contention as to the "admission of irrelevant testimony."

We add other authorities holding that the allegation of ownership is all that is necessary.

Souter v. Maguire, 78 Cal. 543.
Gage v. Kaufman, 133 U. S. 471.

The above was a suit in equity—the allegation was that the plaintiff was seized in fee simple; and it was held that the allegation "is a sufficient allegation that he has the possession as well as the title".

In Stephen on Pleadings, it is so stated as the rule at common law.

See Stephen Pleading, Sec. 175.
Ehrmantrout v. McMahon, 78 Wis. 138.

From the foregoing, and from the authorities above cited it follows 'as the night the day' that the objections to the evidence concerning our discovery vein, to objections to the evidence to show that the so called 520, 108 and 133 foot planes were planes parallel to perpendicular planes passed through the end lines of the claim, to objections to the evidence tending to show that the discov-

ery vein, the vein upon which the patent was based, ran parallel to the side lines and extended substantially from one end line to the other, were not well taken. The facts which this evidence tended to prove were the evidence of our ownership of the vein in question, were part of our chain of title to this vein to the same extent as would be deeds to a town lot.

However, as we have shown in the statement of facts, the complaint shows a mining claim such as appears in the figure thereof drawn from that description in the map filed in this case on our motion to dismiss the appeal. It shows that the claim as it runs north and south is about 1495 feet long and 579 feet wide; and it also appears that the St. Louis Claim is a patented claim. The presumption is in favor of the regularity of the patent, and it will be presumed as is shown by the authorities cited below, that the discovery vein of the claim runs in its general course lengthwise of the claim. This presumption is sustained in the complaint by designating the east line as the east side line of the claim. The words 'projected parallel end line' are familiar expressions and well known to mean lines drawn parallel to the end lines, and these projected parallel end lines can be readily placed by any one drawing a diagram of the St. Louis Claim from the description contained in the complaint, and of course it follows that all portions of this vein between these planes would also be between perpendicular planes passed through the end lines of the claim just as readily as the proposition is grasped that the greater

includes the less. The presumption is in favor of the regularity of the patent and that the end lines as established by the locator are actual end lines of the claim until the contrary is shown, and also that the side lines as established by the locator are the side lines of his claim until the contrary is shown.

Del Monte Mining Co. vs. Last Chance Mining Co., 131 U. S., p. 89, where the following language is used by Justice Brewer:

> "Fourth, the only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed not along but across the course of the vein. In such case the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines."

The authorities cited by counsel upon this point are authorities upon the effect of evidence as to the rights established by the evidence, but are not authorities to the effect that in such a case the complaint would have to allege all of the facts constituting either the source of plaintiff's title or the facts which constitute him the owner of the property in controversy. This allegation of ownership would overcome any presumption if there is such a presumption that the owner of the surface is the

owner of all the ores thereunder; and for the same reason the position taken by the plaintiff in error, that, because the complaint states that this vein enters and departs through the same line, it fails to state facts sufficient to constitute a cause of action, is not well taken. Our ownership is alleged, and whether we own it or do not own it depends upon the evidence upon which we base our title to it, in fact, the ownership of plaintiff of the entire portion of the vein from which the ore in controversy was taken, is not only alleged, but is admitted by the answer: See paragraph II of Complaint (page 1) and paragraph 1 of answer (page 7).

In the Circuit Court of Appeals, the plaintiff in error laid much stress in argument that the complaint was uncertain and indefinite in that, it does not appear therefrom what is meant by the expression "projected parallel end lines". As we have stated, the expression is one often used in mining law to designate lines drawn parallel to the end lines of the claim; the Circuit Court of Appeals had no difficulty in understanding the meaning of the expression, and we apprehend this Honorable court will not either. The witness Keerl explained fully what these lines were. (Page 18).

Moreover, if the plaintiff in error found any difficulty in understanding the expression, it was its duty to demur to the complaint upon the ground that the same was "ambiguous, unintelligible, or uncertain", and failing so to do, it can not predicate error upon any such ground.

The Code of Civil Procedure of Montana provides as

follows: "Sec. 680. The defendant may demur to the complaint within the time required in the Summons to answer, when it appears upon the face thereof, either: (1) That the court has no jurisdiction of the person of the defendant, or the subject of the action, or; (2) That the plaintiff has not the legal capacity to sue; or, (3) That there is another action pending between the same parties for the same cause, or, (4) That there is a defect or misjoinder of parties, plaintiff or defendant, or, (5) That causes of action have been improperly united; or, (6) That the complaint does not state facts sufficient to constitute a cause of action; or (7) That the complaint is ambiguous, unintelligible, or uncertain.

Sec. 681. The demurrer must distinctly specify to the complaint, otherwise it may be disregarded. An objection taken under Subdivision 1, 3 or 6 of Sec. 680 of this Code, may be stated in the language of the Subdivision; an objection taken under either of the other subdivisions, must point out specifically the particular defect relied upon.

Sec. 685. If no objection is taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

No demurrer was filed to the complaint upon which the trial of this cause was had.

This action was commenced before the Code of Civil Procedure was adopted in 1895; but the Practice Act in

force at the time of the commencement of this action was identical with the present act so far as these questions are concerned; and the amended complaint and rules concerning demurrers thereto were governed by the Code of Civil Procedure above cited.

See Kimpton vs. Jubilee Placer Co., 22 Montana 108.

The defendant having failed to demur under Subdivision 7, or at all, to the amended complaint, it is deemed to have waived the objection.

Even had a demurrer been filed, it would have availed nothing unless it specifically specified wherein the complaint is ambiguous, uncertain or unintelligible.

Jacobs Sultan Co. vs. Union M. Co., 17 Mont. 61.

Moreover by answering, the defendant would have waived any demurrer which it might have filed.

Moreover, the evidence of the witness Keerl cured any ambiguity or uncertainty.

Spencer v. Mont. R. R. Co., 11 Mont. 164-7.

The cases cited by the counsel effectually dispose of the objection to the effect that the vein in question enters and departs through the same side line. In the first place it was not alleged to be the discovery vein. It was alleged that plaintiff was the "owner" of it. The argument as to the sufficiency of that has already been made. It must be assumed that we are the owner in some proper

manner, the fact being alleged. Being a by or ancillary vein as shown by the evidence we had the right to recover upon it to the entire extent that we had the right to recover upon the original vein. The plaintiff the St. Louis company is entitled to the Drum Lummon vein to its entire extent from the north end line to the south end line of the St. Louis. We requote what counsel quotes on p. 34:

> "First the location as made on the surface by the locator determines the extent of rights below the surface; second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike; third, every vein, 'the top or apex of which lies inside of such surface lines extended downward vertically,' becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor; fourth, the only exception to the rule that the end lines of the location as the locator places them establishes the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed, that, in fact, the location has been placed not along, but across the course of the vein. In such case, the law declares that those which the locator called his side lines are his end lines, and those which he

called end lines are in fact side lines, and this, upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location. Our laws have attempted to establish a rule by which each claim shall be so many feet on the vein, lengthwise of its course, to any depth below the surface although laterally its inclination shall carry it ever so far from a perpendicular. Mining Company vs. Tarbet, 98 U. S. 463-468."

"These propositions we affirm, with the addition that the end lines of the original veins shall be the end lines of all the veins found within the surface boundaries."

In other words, it is not necessary that the by-vein extend from end line to end line or that it cross either end line. It is not necessary to allege that the discovery vein or any vein crossed either end line. This is determined by the case of

Del Monte vs. Last Chance Mining Co., 171 U. S. 55.

It is sufficient that the strike of the vein runs with the mining claim to the extent that the course of the vein runs along the same direction of the mining claim; so far the owner of the mining claim has the right to follow it upon its dip. If the discovery vein runs from end line to end line as in this case he takes all veins for that en-

tire distance. If the discovery vein is like the Drum Lummon in this case extending along the same direction as the mining claim and running with it, and if the apex is only a part of the way within and a part of the way without the limits of said claim then the owner of the apex could take so far as it lay within the mining claim although it should depart from the same side line.

Tyler vs. Sweeney, 157 U. S. 54 Fed. 284.
Last Chance vs. Tyler, 61 Fed. 558.

All that was required in the Tyler-Last Chance case was that the vein should run with the claim. The same contention was made in this court by the distinguished counsel for the Last Chance Mining Company, that because it passed over the side line there could be no extra lateral rights and this court held that it was sufficient if the mining claim was laid along the strike or course of the vein; so far as that question was involved, it was sustained by the Supreme Court and by the case of

Del Monte vs. Last Chance Mining Co.

The quotation from the Del Monte case (ante) certainly contradicts the statement of counsel for plaintiff that "in no case yet decided, has it been held that a patent to a mining claim raises a legal presumption" that the vein upon which the location of a mining claim is based, "its discovery vein, passes through the claim lengthwise of the claim." (See p. 22 of their brief). It seems to us that this Honorable Court has emphatically said, by the language

quoted from the Del Monte case, and has affirmed it in the Walrath case, that the only exception to the rule that the end lines as located are the actual end lines of the claim, and that the side lines as located are the actual side lines, is where or when the fact is shown to be contrary to this presumption—where or when it is developed (actually shown) that the location has in fact been placed not along, but across the course of the vein.

As appears in this case, this vein from which the ore was extracted is not the located vein—it appears that it was and is in fact "a by-vein"—and as such is subject to and controlled by the rule stated in the Walrath case, which rule affirms the four rules (or propositions) stated in the Del Monte case, and adds to the mining law the following proposition: "These propositions we affirm, with the addition that the end lines of the original veins shall be the end lines of all the veins found within the surface boundaries."

Applying the four rules stated in the Del Monte case and the additional rule just quoted from the Walrath case, to the facts in this case, certainly it cannot be claimed that defendant in error has no extralateral rights in the vein in question.

The presumption not only is that our claim is located lengthwise of the located vein—but the facts show that the located vein runs lengthwise through the whole claim; See the evidence of the witness Jenny (pp. 23-24), and the witness Parks (pp. 20-21); who says that the Discovery veins "runs generally parallel to the side lines",—again

he says, "On the south end it has been developed within seventy feet,"—again he says "it crosses the south end line. Northerly it is followed into the sixty five foot shaft and 60 to 80 feet beyond. I think it runs out of the north end of the claim."

See also the evidence of the witness Mayger (p. 17). The evidence shows plainly that the vein not only runs lengthwise of the claim, but also runs the full length of the claim and through its end lines.

These end lines, then, determine—these end lines of the original vein—"shall be the end lines of all the veins found within the surface boundaries."

See Walrath v. Champion M. Co., 171 U. S. at p. 308.

Supposing, however, for a moment that the vein from which this ore was taken, was and is the vein, known as the "Located Vein", or as the "Discovery Vein",—still we maintain that would have extralateral rights upon it.

Counsel do not state the rule (See p. 20 of their brief) as we understand it to be, as applied to the facts in this case.

The rule as stated by the court, the rule which this court says determines what are the end lines—that rule does not state that the end lines are those lines which are 'crossed by the Discovery Vein';—but that rule declares that "the end lines of the location as the locator places them" are his real end lines, except where "it is developed

that in fact the location has in fact been placed not along, but across the course of the vein".

In fact in the Del Monte case we are reminded very forcibly that nowhere does the law require the vein to pass through any line, and that a vein may have its beginning and ending within a claim, and the locator would still have his extralateral rights. And in that case—in the Del Monte case, the rule is not stated as counsel state it in their brief; it could not have been. Counsel, speaking of end lines, and extra lateral rights, ask—"And how is this to be shown?"—and then counsel answer their own question as follows—"By showing which of these lines is crossed by its discovery vein on its course through the claim. The end lines are not those lines which the locator has called such in the location of his claim but they are such as are actually crossed by the discovered vein on its strike" (p. 20, brief of plaintiff in error).

And to sustain their answer to their own question, counsel cite the Del Monte case, in which the vein "actually crossed" one end line and one side line; and still the owner of the claim was declared to have extra lateral right bounded only by his end lines. Again in Clark v. Fitzgerald, the vein crossed one end line and a side at a point about mid-way between the two end lines; and extralateral rights were granted,—and i nneither case did the side line determine the extra-lateral rights.

The rule stated by this court is in effect this: The course of the located vein as it lies within the claim determines which are the end lines and which are the side

lines; if that general course is lengthwise of the claim, the end lines as located are the actual end lines of the claim; on the other hand, if that course is more across the claim than lengthwise of it, then the side lines as located become the actual end lines.

Let us examine then the facts as shown in regard to this vein, still assuming (contrary to the facts) that it is our discovery vein. We must remember that the vein dips toward the east, away from the claim—so that the foot wall, at either end, will not pass out of our claim until after the hanging wall does; beginning then at the south end, the foot wall, as alleged in the complaint, passes out at a point 133 feet south of corner No. 2, which corner is 403 feet north of the corner No. 3, the S. E. corner; at the northerly end, both of the walls are within the claim at a point 520 feet south of the N. E. corner 520 foot plane, it still travels closely along the east side (Cor. No. 1). Assuming that it passes out entirely at the line of the claim 730 feet, and, as shown by scale, it never gets further away from the east side line than about 60 feet.

Can it be said of such a vein that it does not lie more lengthwise of the claim than crosswise of it? It certainly lies very much more lengthwise of the claim, than does the vein in Clark v. Fitzgerald: certainly its course, its general course is lengthwise with the claim as located; and, consequently, even if this vein was our discovery vein, we would have extra lateral rights.

But as we have said, this is not and was not our Dis-

covery vein—that vein ran almost parallel with the side lines—almost at right angles "to the lines marked on the map 3 and 4 and 1 and 6" (See p. 17, evidence of Mayger), which are the ends of the claim; and as we have seen it runs through both end lines. These lines then, the end lines, the real as well as the located end lines of our located vein, "shall be the end lines of all the veins found within the surface boundaries".

Walrath v. Champion M. Co., 171 U. S., at p. 308.

And from this we claim that points III, IV and V of counsel's argument are against the law; we claim that the complaint having alleged our ownership of the vein in question between the planes mentioned, the evidence complained of was properly admtited, because it was the evidence of our ownership.

II.

The next point asserted by the plaintiff in error is as to the so-called estoppel by deed. In this connection it may be well to remember that the defendant in error in the court below was confined to the proof of ore extracted on the dip of the vein between the 520 foot plane and the 108 foot plane; that is to say, it was confined to that portion of the vein, which had its entire apex within the boundaries of the St. Louis Mining Claim, exclusive of the thirty foot strip; that is to say, between these points both the hanging wall and the foot wall were entirely

within the surface ground of the St. Louis Mining Claim, exclusive of the thirty foot strip, and it was shown by the evidence of the witness Jenney and the witness Parks that the discovery vein of the St. Louis claim was not the vein in question, but was a vein running very nearly through the center of the St. Louis claim and almost through the entire length of the St. Louis claim as described by the locator and as patented, and, that, in the opinion of these witnesses, who were shown to be well versed in the formation and history of veins, and who had made an examination of this vein, this vein passed through the north end line and also through the south end line of the claim.

Now, in considering this subject we will consider what the rights of the St. Louis company are irrespective of the deed to the thirty foot strip. It is asserted by counsel that inasmuch as the vein enters and departs through the same line, there can be no extra lateral rights to the vein on its dip. We do not consider that this proposition is correct. We do not believe that even if this were the discovery vein that the rule of law for which counsel contends is correct, for even if this were the discovery vein, it runs lenghtwise with the claim as located, its general course and direction is with the length of the vein as locatedand not crosswise thereof, and that would be enough to bring the case within the rules announced in the Del Monte case, for there is no law which requires that the vein to be located shall cross any line whatever. There is no law which prohibits it entering a side line and cross-

ing an end line, and no law which prohibits it from entering a side line and departing from the claim through the same side line. The course of the vein and its general direction, when that is shown, determines what are side lines and what are end lines, and that irrespective of any lines which it may or may not cross. (See the Del Monte case.)

However, this is not the discovery vein, as appears from the testimony of the witness Mayger, the witness Jenney, and the witness Parks. The discovery vein itself determines which are the end lines of the claim, as we have already said, and which are the side lines, and in this case it is shown from the evidence of the witnesses that the end lines are those so declared to be by the locator of the claim by virtue of the location of the claim, its recordation and patenting, all of which are admitted to be prior to the location, recordation and patent of the Nine Hour claim.

The owner of the St. Louis claim is entitled not only to the discovery vein, but to all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward and vertically, and, to quote from the Del Monte case:

> "Every vein whose apex is within the vertical limits of his surface lines passes to him by virtue of his location. He is not limited to only those veins which extend from one end line to another, or from one side line to another, or from one line

of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines. Not only is he entitled to every vein whose top or apex lies within his surface lines. Not only is he entitled to all veins whose apexes are within such limits, but he is entitled to them throughout their entire depth, 'although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.' In other words, given a vein whose apex is within his surface limits he can pursue that vein as far as he he pleases in its downward course outside the vertical side lines. But he can pursue the vein in its tical side lines. But he can pursue the vein in its depth only outside the vertical side lines of his location, for the statute provides that the 'right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations," etc.

Now, where is it found in this statute that given a regularly located mining claim with the discovery vein running with the side lines of the claim in its general course, that the right of the owner of such claim is confined to such veins only as in their general course run lengthwise of the claim? Where it is to be found in the statute that his right to veins other than discovery vein

is limited to any particular class of veins, or to any veins running in any particular way in their course or direction? The statute says that he is entitled to all veins, the top or apex of which lies inside of his surface lines extended downward vertically. All veins would include a vein which passes through both end lines and it would also include a vein the top or apex of which is within the vertical side lines, although such a vein might in its course cross the same side line. This doctrine is, as we assert it, laid down in the case of Champion Mining Co. vs. Walrath, where, however, it is extended, so that the right to follow such a vein, even though it be not the discovery vein, is bounded only by planes passed through the end lines of the claim as such end lines are determined by the discovery vein.

It must be quite apparent that irrespective of the deed the right of the defendant in error to follow the vein in question between the planes to which is was limited in the court below is absolute, because it is a vein other than the discovery vein, having its top or apex within the surface boundaries of the St. Louis claim, and the portion in question is well within the end lines of the claim; it is even confined to so much of the vein as has its entire apex within those surface boundaries.

What effect then did the deed have?

In discussing this question we will first discuss the effect of a deed without considering the circumstances concerning the execution of the deed so as to effect

its interpretation. We do not agree with counsel in the assertion that any common law rights attach to a deed to a mining claim. It is a well established rule that a deed by the government carries nothing by implication. By the statute law concerning mining claims all that a locator obtains by locating a mining claim on the public domain is the exclusive right to the surface ground and all veins having their top or apex inside of the surface lines extended downward vertically, and the further right, which is absolutely inconsistent with the idea of a common law grant, to follow such veins on their dip beyond his vertically side lines, which right is limited to perpendicular planes passed through his end lines; he owns no veins apexing outside of the boundary lines of his claim extended vertically downward.

This case must depend entirely upon the construction to be given to the deed, Exhibit "B", page 10, of the Compromise Ground. In construing that deed either with or without the other papers connected with it we must remember:

> "That the language used is to be construed with reference to the peculiar property about which the parties were contracting."
>
> Richmond Mining Co. vs. Eureka Mining Co. 103 U. S. 846.

"The peculiar property" that we were contracting about then is the subject to which we must direct our attention. It was not only a mining property, but it was also a min-

ing property which was "a part of the Nine Hour mining claim." It is contended by the plaintiff in error that the words contained in that deed are capable of two meanings. 1. A meaning which gives a vertical line on the westerly side of the Compromise Ground and another a meaning which gives a line parallel to the vein on the other side of the Compromise Ground. The expression in the deed so often referred to and the part of the general printed clause in such a deed:

> "Together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz-rock and earth therein, and all the rights, privileges and franchises thereto incident, appended or appurtenant, or therewith usually had and enjoyed,"

is capable of more than one meaning. Was it intended to convey by vertical lines as in the case of agricultural lands, or was it intended to convey only such ores as the Nine Hour claim would have been entitled to had there not been a wrong survey across a part of its area, or was it intended to convey that which wholly or in part apexed within said claim? Three or four different meanings may be given to this language, all entirely consistent with its terms. Under all these circumstances it was the duty of the court to place itself in the position of the parties and to receive evidence outside of the deed of the circumstances under which the parties were placed. Of course that evidence must consist in proving the peculiar circum-

stances under which the survey was made, the controversy in the land office between the parties, the contention in court which was the result of the controversy in the land office and the contract made in promise of that controversy and the suit thereon. We think that this was admissible and in proof thereof we call your honor's attention to the following decisions:

In Nash vs. Towne, 5 Wallace 699, it is said:

> "Courts, in the construction of contracts, look to the language employed, the subject matter, and the surrounding circumstances, and may avail themselves of the same light which the parties enjoyed when the contract was executed. They are accordingly entitled to place themselves in the same situation as the parties who made the contract, in order that they may view the circumstances as those parties viewed them and so judge of the meaning of the words and correct application of the language to the things described."

In Canal Co. vs. Hill, 15 Wall. 94, it is said:

> "To ascertain the intent of the parties is the fundamental rule in the construction of agreements. * * * * The state of things and surrounding circumstances in which an agreement is made, will be looked at as a means of throwing light upon its meaning especially for the purpose of ascertaining its true subject matter." See Syllabus.

In Merriam vs. United States, 107 U. S. 437, the syllabus is:

> "In construing contracts, a court may look not only to their terms, but to their subject matter and the surrounding circumstances, and avail itself of the same light which at the time of making them the parties possessed."

In Doe vs. Burt, 1 T. R. 701, where a lease had been made by the plaintiff to the defendant of part of a messuage, together with a piece of ground thereunto adjoining, which piece of ground was used as a yard, and beneath the yard was a cellar, occupied by a third party under a lease previously granted to him by the plaintiff, and the occupant of the cellar continued to reside in it and to pay rent to the plaintiff for three or four years after the latter had demised the yard to the defendant, but his lease expired, and he having quitted the cellar, the defendant took possession of it, contending that it had passed to him by the demise of the yard, the court held that parol evidence of the surrounding circumstances was admissible to show that it did not pass. In this case the court said:

> "The only question is whether the court is absolutely bound by the terms of this lease to put the construction on it, for which the defendant contends. Now, it seems to me, that the construction of all deeds must be made with a reference to their subject matter. * * * In the present

case, considering the nature of the property, it was proper to let in evidence to show the state and condition of it at the time when the lease was granted. Prima facie indeed, the property in the cellar would pass by the demise, but that might be regulated and explained by circumstances. Therefore I am of opinion, that, considering all the circumstances of this case, it was proper to receive the evidence at the trial, which, when received, proved that the cellar was not intended to be passed by the demise to the defendant."

And in Walsh vs. Hill, 38 Cal. 481, the third paragraph of the syllabus is:

"In construing written instruments, the only rule of much value—one which is frequently shadowed forth, but seldom, if ever, expressly stated in the books—is to place ourselves as nearly as possible in the seats which were occupied by the parties at the time the instrument was executed; then, taking it by its four corners, read it."

In Bradley vs. The Washington, Etc., Co., 13 Peters 100, the court says:

"We think that the rule of law, which admits extrinsic evidence for the purpose of applying a written contract to its subject matter, justifies its admission, beyond the mere designation of the thing or corpus, if we may so express it, on which the contract operates, and extends so far as to embrace the circumstances which accompany the

transaction; when, without the aid of those circumstances, the written contract could not be applied to its proper subject matter.

Browne on Parol Evidence, Sec. 53.

2 Wharton on Evidence, Vol. 2, Sec. 940.

In the case of Miles against Barrows, 122 Mass. 581, the court said:

> "But if, upon applying a deed to the land, it is found to be ambiguous, parol evidence of the surrounding circumstances and of the acts of the parties is competent to aid in the interpretation of the deed, and to enable the court to ascertain what was the intention of the parties in the words which they have used."

See Reed vs. Insurance Co., 95 U. S. 31, where the learned judge applies the well known language of Taylor:

> "Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and, in order to do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject matter. With this view, extrinsic evidence must be admissible of all the circumstances surrounding the author of the instrument." Taylor Evid., Sect. 1082.

In the case of Brawley vs. United States, 96 U. S. 173 the court says:

> "Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject matter of a contract, and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used."

The same rule of interpretation is found in the statute of Montana. In the Civil Code, the rule is stated as follows: Sec. 2207. "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together".

Sec. 2212. "A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates."

And again in Section 3137 of the Code of Civil Procedure as follows: "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

And this Section is found identically the same as Sec. 632 Code of Civil Procedure in the Compiled Laws of Montana, 1887, which section had been in force since 1875, and remained in force until the adoption of Sec. 2207, 2212, 2213 and 3136 Supra.

When this deed is viewed in the light of the circumstances in which the parties were placed, to-wit: the original controversy between the Nine Hour and the St. Louis, the purpose for which the suit for specific performance was brought, the fact that the owners of the Nine Hour were permitted to recover without any deed of conveyance or assignment from the persons to whom the contract for the Compromise Ground was given, the findings of the court in the specific performance case and the decision of the courts thereon all these together show conclusively that the deed of the little strip known as the Compromise ground conveyed nothing more than just a part of the Nine Hour Claim. That the St. Louis did not deed and therefore reserved all the rights its would have had, had the claim been surveyed originally to and including its present boundaries. That was the intent of the parties. The Nine Hour never paid for or claimed any part of the vein or any vein belonging to the St. Louis Mining claim. All that had its apex within the St. Louis belonged to it and had belonged to it and had never been contracted to be conveyed and by no slight of hand or skill in wording conveyance could be considered to be transferred to the Nine Hour claim.

The record of the specific performance case pages 32 to 44 is filled with statements that this strip was to be considered as a part of the Nine Hour claim and not as an independent purchase or conveyance. At page 33 it alleges that it is the owner of the Nine Hour Claim and at page 34 it alleges:

"That thereupon, and on the seventh day of March, A. D. 1884, to settle and compromise the said suit and adverse claim and for the purpose of settling and agreeing upon the boundary line between the said Nine Hour Lode mining claim and the said St. Louis mining claim, the said defendant, Charles Mayger, made, executed and delivered to said Robinson, Huggins and Sterling a certain bond for a deed in writing,' etc. and at page 67 paragraph four the plaintiff in that suit claimed that it was not the assignee of said bond but successor by virtue of owning the Nine Hour claim. It there alleges that it is now the owner thereof and in the possession and entitled to the possession of the whole and every part of said Nine Hour Lode Mining Claim and as such it made a demand for a deed. At page 68 plaintiff again describes itself as being 'the successor in interest of the said Robinson, Huggins, Sterling, and its other grantors."

And the court said in its findings of fact, second finding, page 41.

"That the strip of ground called the 'compromise ground,' which is the subject of dispute in this action, was, at that time and thereafter continued to be a part of the Nine Hour Lode Mining Claim."

And in the fifth finding the court finds, (page 41):

"That at the date of the execution of said bond the said Robinson, Huggins and Sterling, Eddy and

> DeCamp, were in the actual possession of the said compromise strip, and they and their successors in interest have ever since remained in the possession thereof, claiming and holding the same *as a part of the said Nine Hour Lode Mining Claim*,"

not a possession merely, but possession *as part of the Nine Hour Lode Mining Claim.*

And in the eighth finding that the conveyances were intended to convey the entire interest in the Nine Hour Mining Claim:

> "And it was the intention of the parties to the deeds to convey as well their interest in said compromise strip as every other part and parcel of the said Nine Hour Lode Mining Claim."

It is apparent from these findings and from the allegations in the complaint that in truth the plaintiff in that suit was not the assignee of the contract sued upon but had become the grantee of the Nine Hour and to recover, it was necessary to show tht the strip was not to be conveyed as an independent piece of ground, but a part and parcel of the Nine Hour Lode Mining Claim. All these quotations from that record show beyond any doubt or question that it was the intention of the parties to make good and whole the Nine Hour Lode Mining Claim as it existed before the St. Louis had surveyed for its patent, to convey to the grantee everything that would have been the property of the Nine Hour Mining Claim; and nothing else; and not any part or parcel of the rights of

the St. Louis Mining Claim either on the surface or beneath, either on the apex, strike or dip.

What would be the rights of these parties had the owners of the St. Louis owned the whole of the Nine Hour and had conveyed the whole of the Nine Hour? Would it convey any of the St. Louis in doing it? A conveyance of the Nine Hour would only carry the conveyance of the government, and the owners of the Nine Hour would own only the surface and the veins which have their apex therein. A deed from private parties for the Nine Hour would reserve, as the patent from the United States would reserve, the right of all persons, including the grantor, to enter underneath the premises upon a vein having its apex within their own land and extract ore therefrom. Counsel have said in their brief (p. 29) that reservation is necessary and cite instances of the reservation in the patent and then say: "If reservations are necessary to be made on the part of the government it is difficult to understand why the same reservations should not be made in his deed by an individual grantor."

True, but reservations are not necessary to be made by the United States government. The patent for lands of the United States government is construed with reference to the properties conveyed and in obedience to law; and whatever language used conveys simply what the language of the laws conveys, Sec. 2322 viz the surface ground and all veins having their apex therein and that is all that is given by the law of Congress and not more.

Deffeback vs. Hawke, 115 U. S. 392-406.
Davis's Admr. vs. Weibold, 139 U. S. 506.

The case of Richmond Mining Company vs, Eureka Mining Co., 103, U. S. 839, entirely supports our contention. The Potts Chamber involved in that litigation was upon the dip of the vein far outside of all the premises if considered at the time of the original compromise. A deed dividing the premises along the course of the vein was held to carry not only the surface but also the dip of the vein. It was vertical in its application lengthwise of the vein, but on the dip of the vein it was held to carry the whole dip. The circumstances were entirely different from this. To make it applicable here there should have been a controversy as to the length of the apex by these parties and a division along the strike of the apex would have been held to carry the dip also; and as quoted above, the language used with regard to a mining deed is to be construed with regard to the peculiar property about which the paties are contracting.

Neither does the case of Stinchfield vs. Gillis, in the 96th and 107th California, sustain the contention of the plaintiff in error, and moreover the deed in that case was not made under the circumstances which surround the execution of the deed in the case under review, but the Stinchfield case is an authority directly in point to the effect that the surrounding circumstances may be shown. In that case Gillis had been in possession of a large tract of mineral land. He conveyed a part of it by bargain and sale deed, with implied warranty. One vein apexed in the part sold and another vein apexed in the part retained by Gillis. These two veins united on their dip within

the surface boundary lines of the part conveyed. It will appear from the facts stated in the 107th California that the defendant claimed that the land had been located under two locations and that the part retained was the prior location.

> "At the former appeal herein it was held that if the locator of a mining claim should convey a portion of his claim without any reservation in his deed of conveyance, his grantee would be entitled to all the gold that might be found within the ground conveyed in any vein whose apex was within the surface lines of his deed; so, if a locator should convey to A the east half of his claim, and afterwards should convey the west half to B, each of his grantees would in the same manner be entitled to all of the gold found in any vein which was entirely within the surface lines of his conveyance; and, on the same principal, if the proprietor of a tract of mining ground which has been derived through several locations should dispose of the same in parcels irrespective of the lines of such locations, the rights of his grantees would be measured by the terms of their deeds. In such cases section 2336 of the Revised Statutes of the United States has no application. That statute was not intended to limit or define the rights of a person in mere possession of a tract of mining ground where there is more than one vein, or to prescribe the effect of a conveyance by the locator

of a claim of a portion of his location containing one of such veins. The object of the statute was to supplement the provisions of section 2332, and to prescribe rules under which different locations by different proprietors should be held, and to determine the rights of such proprietors in case of intersecting veins. At the date of the passage of that act, May 10, 1872, the Carrington claim was and had for many years been held as a single claim, without any adverse claim thereto, and it continued so to be held until the conveyance by Gillis to the plaintiff in 1886. The position of the proprietor of a mining claim who conveys a portion thereof, and retains the remainder, is analogous to the position of the United States after it has issued its patent for a location. As the United States, as well as a subsequent locator, holds the unpatented claim subject to the prior rights of the patentee, as prescribed by section 2336, so the grantor of a portion of his claim, in the absence of any reservation in his deed, or proof of mining customs, holds the ungranted portion subordinate to the rights of his grantee in the ground conveyed."

The portion above cited immediately precedes the portion of the opinion cited by counsel for plaintiff in error, the following is also a quotation from the Stinchfield case and immediately succeeds the portion cited by counsel for plaintiff in error:

"In thus holding, we concede that, when mining ground is conveyed by deed without express limitation, the grantee takes subject to the characteristics of mining property given to it by prevailing customs and law, and not with the absolute dominion which flows from a conveyance in fee of ordinary land. The mining land thus granted is still subject to all mining laws and customs which are applicable, but the provision of section 2336 that, when two veins intersect, 'priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection' cannot possibly be applied to the case where A conveys part of his mining claim to B, for in such a case there is no 'prior location.' Therefore, in such a case, the ordinary rules which govern grants of land must of necessity apply; and, if the intersection takes place on part of the claim conveyed, the grantee takes all the mineral within the space of intersection.

Whether the plaintiff would have been entitled to follow the West vein into the ground retained by Gillis, and to claim the gold found therein, or whether Gillis would have been entitled to any of the gold that might be found in the Rice vein, within the ground conveyed to the plaintiff, are questions which are not involved in this appeal, and upon which we do not express any opinion. All that we hold is that, inasmuch as the gold in

question was within the ground conveyed by Gillis to the plaintiff, and in a vein whose apex was within the surface lines of that ground, it belonged to the plaintiff."

This language is quite pertinent to the issues in this case,

> "So, if a locator should convey to 'A' the east half of his claim, and afterwards should convey the west half to 'B' each of his grantees would, in the same manner, be entitled to all of the gold found in any vein which was entirely within the surface lines of his conveyance."

We respectfully call to the attention of the court that this action refers to only such portion of the vein as is entirely within the ground and not conveyed to plaintiff in error, that is to say, the entire apex of that portion of the vein within which these ore bodies are found is within the boundary lines of the St. Louis claim exclusive of the compromise ground.

And this portion of the language is also quite pertinent:

> "Whether the plaintiff would have been entitled to follow the west vein into the ground retained by Gillis (the west vein apexed in the ground owned by Gillis) and to claim all the gold found therein, or whether Gillis would have been entitled to any of the gold that might be found in the Rice vein, within the ground conveyed to the plaintiff, are

questions not involved in this appeal and upon which we do not express any opinion."

As we have seen the portion of the vein containing the ore bodies sued for had no apex within the ground conveyed. But this case does hold that the surrounding circumstances may be shown; and that is the only question involved in the present discussion.

Let us further consider the construction to be given the deed, on account of the use of the words "together with all the mineral therein contained," in the connection in which they are used. Indeed the whole theory of plaintiff in error's claim is that these words so add to the thing conveyed, as to include the minerals in that portion of the vein apexing outside of the Compromise Strip and apexing within the surface boundaries of the Saint Louis claim. In their brief in the Circuit Court of Appeals, counsel say: "There has been a continuous and consistent sequence in these steps from first to last. If language can gain force by repetition and reiteration, it would seem that the phrase 'together with all the minerals therein contained,' had been the prominent *idea* in the minds of the actors in this controversy from its conception."

The phrase never was used by the locators of the Saint Louis and Nine Hour Lode claims but once, and that was in the covenant to restore the Compromise Strip to the Nine Hour Lode claim after the patent to the Saint Louis, and it cannot reasonably be claimed that it has any

greater or less significance than it had at the time and in the connection in which it was used. It is the foundation of the rights of the parties as used in the covenant, and its meaning therein will control the meaning of the findings and judgment as well as the deed, made in pursuance of them.

Counsel for appellants in error, by the frequent use of the phrase, in all subsequent proceedings since the execution of the covenant for a deed, seem to be enchanted into the belief that there is sufficient magic in it to convert a deed executed with direct reference to the Acts of Congress, which alone can make primary dispositions of the public lands, into a deed at common law and thereby invest it with qualities it did not otherwise possess. The court will not assume for a moment that the phrase has more significance in the deed than it has in the covenant for that deed. It sprang from and was based upon the covenant, and its meaning must be interpreted the same in the one as in the other. Hence the gravamen of this contention is solved by the purpose and intention of the parties to the covenant. If the sense in which it is used can be arrived at from the pleadings and instruments themselves, (and that meaning is not changed or affected by the extrinsic evidence of the surroundings under which they were made), then this extrinsic evidence, about which there is so much contention, is of no practical consequence. If the same results are reached without it, the error, if any, is shown to be harmless and is within the meaning of the Code of Civil Procedure of

Montana, announcing the general rule in such cases, which reads: Sec. 778. "The court must, in every stage of an action, disregard any error in the pleadings or findings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

The answer of plaintiff in error, Record p. 7, sets out the fact of the execution of the covenant for the deed and makes the covenant a part of the answer; that a demand was made for a deed "in accordance with the terms and provisions of the bond"; that an action was commenced to compel its specific performance; that a decree for specific performance was duly made and the deed executed in pursuance of it. It is not claimed that there was any reason to enlarge the premises or estate to be conveyed by the covenant, nor is it asserted that it was done or intended to be done by the decree or deed, but on the contrary just what was contemplated by the covenant was accomplished by the judgment and deed. Aside from any extrinsic evidence admissible under the statutes of Montana, for the purposes of arriving at the intention of the parties, this pleading and the exhibits referred to and made a part of it disclose the following facts:

1st—That the predecessors in interest of plaintiff in error claimed the exclusive right of possession and enjoyment of what is known as the Nine Hour Quartz lode mining claim under the laws of the United States, including the Compromise Strip as a part thereof.

2nd—That the predecessor of defendant in error

claimed the exclusive right of possession and enjoyment of the Saint Louis Lode mining claim under the laws of the United States, including the Compromise Strip as a part thereof.

3rd—That the predecessor in interets of defendant in error made application for a natent for said Saint Louis Lode claim, including said Compromise Strip as a part of it, and that the predecessors in interest of plaintiff in error interposed their adverse claim to said application and brought their action accordingly.

4th—That the boundary lines were agreed upon, the action dismissed, and a covenant given by the applicant to the contestant to convey and restore to the contestants the Compromise Strip as a part of the Nine Hour claim, upon recovering a patent to the Saint Louis claim, and that the deed in question has been executed in pursuance of the covenant.

The only title *held* by the parties to the covenant and the title they could acquire by the patent, was just such a title as is authorized and created by the laws of the United States to a quartz claim, as distinguished from a title to land at common law. Both parties are presumed to know the law, and the question is, under such circumstances, does the phrase, "together with all mineral therein contained" apply to the estate and premises held by the respective parties under the laws of the United States, or shall it have the form and effect it would have at common law, and comprise something more?

There is no contention here as to any minerals that are not contained in that part of the vein having its apex outside of the Compromise Strip, and within the boundaries of the Saint Louis claim. Whatever rights may exist as to the mass of made or country rock within vertical planes extended downwards upon the exterior boundary lines of the Saint Louis claim, after it had restored the Compromise Strip to the Nine Hour, or whatever rights the Nine Hour claim had thereto after such restoration, is not involved in this litigation.

It seems too plain for controversy that under the pleadings, aside from any extrinsic evidence, the parties to the covenant were contracting with reference to the statutory rights each held and could acquire to a quartz mining claim, and none other. The metes and bounds were necessary to the description of the Compromise Strip in conveying and restoring it to the Nine Hour Lode claim, and in no manner restrained or enlarged the statutory right to or in it as part of a quartz mining claim. It is manifest that it was the intention to restore the Compromise Strip to the Nine Hour lode claim, so that it should be held intact as a part of it possessing just such rights as it would have had, if no claim had been made to it by the Saint Louis Claim; and no intention is expressed or implied under such circumstances, that either party surrendered any right that is incident to either claim. Under the laws of the United States, the decision of the Supreme Court, and of this Court, the parties possessed, and will be presumed to have contracted, with

reference to the surface and all veins apexing within it, and the right to pursue such veins as to such parts, in their downward course from the apex to the bottom of them, "together with all the mineral therein contained." The phrase "together with the mineral therein contained," refers to the premises and estate possessed and expected under the law, *i. e.*, the surface and veins apexing therein and not belonging to some prior location. As to such veins, the phrase would be implied whether inserted or not. Leave out the phrase, and how would the matter stand. The Saint Louis Company wants to convey and restore to the Nine Hour Lode the Compromise Strip and make them a deed for it. Under the law it would comprise the surface and the veins apexing and not included in a prior location in it from top to bottom, to the extent of such apex. Metes and bounds are absolutely necessary in describing the premises in such case, and neither add to nor diminish the premises or estate to be conveyed. It is for the sole purpose of locating the *surface* and *veins* apexing within it, that a survey is had and metes and bounds established to convey and restore such veins and surface. Now, what is conveyed and restored to the Nine Hour claim? It is the surface and veins described, "together with the minerals therein contained." And so it is; the phrase would be implied in the connection in which it is used, and being expressed, does not in any way affect the premises or estate granted, unless it could indeed be said that the mineral in the vein did not pass with it unless so expressed. But we find under the law that it is the vein of minerals and surface

that would and did pass, whether expressed or not. Confining the phrase to the estate and premises owned by the Nine Hour claim and restored to it, and we find that the phrase is necessarily implied under the law, the decision of the Supreme Court in the Del Monte Mining and Milling Company vs. Last Chance Mining and Milling Company, 171 U. S., 55, and the decision of Circuit Court in this case, and the fact that it is expressed, is of no consequence.

Counsel cite Winter vs. Loveden, 1 Lord Raymond, 267 and Cardigan vs. Armitage, 2 Barn. & Cress., 197, to show that the words, "together with," in connection with a previously mentioned subject in a deed or power, operate to enlarge and not restrain that which was previously granted. No lawyer would claim that the words were restrictive, and the question as to whether they enlarged the previously granted premises would depend entirely upon the connection in which they were used. If used in connection with a conveyance of land under a statute that made the appurtenances pass with the land, a conveyance of the land, "together with" the appurtenances expressed in the deed, neither adds to nor detracts from "what was previously granted." And so it is here; a piece of land is necessarily described by metes and bounds to see how much surface and what veins are included in it, and under the statute to afford the means of conveying them. And it is not contemplated that this description by metes and bounds shall enlarge the estate and premises manifestly intended to be conveyed, so as to include more than

the veins and surface and mineral therein contained. The phrase will be limited to the estate and premises theretofore conveyed and the mineral therein contained as defined by the statute, and not extended so as to give them the effect of a common law title. If a right to follow a vein on its dip is not expressed, it would be implied under the law, so that it would add nothing to the estate or premises conveyed by expressing in the conveyance "together with" the right to follow the vein on its dip. When an estate in fee is granted, adding the words together with the quiet and peaceable possession thereof, does not enlarge or broaden the estate previously granted, and when a right, title and interest or defeasible estate is granted, the addition of the words "together with the quiet and peaceable enjoyment thereof forever" is limited as to the estate conveyed, and is not allowed to attach itself to the land and broaden or enlarge the grant. Here the parties contracted with reference to the surface of the claim and veins apexing therein and not belonging to a prior location, and it is sought on account of the description necessarily employed to grant them, to enlarge the grant by not limiting it to the surface and veins, and allowing the phrase 'together with the minerals therein contained' to broaden and enlarge the thing granted, *i. e.*, to convert what is comprised in a statutory grant into one contemplated at common law. With as much reason could they expect defendants in error to protect the ground beneath the surface and defend it against a stranger who was pursuing his vein, as he had a right

to under the Nine Hour claim, as that is just what their theory leads to. If the granted premises includes a common law right, the covenant of warranty is co-extensive with it.

It is contended that "allegations of fact by the pleadings repugnant to the correct construction of the contract may be disregarded," and numerous authorities are cited to support the proposition. No one doubts that a pleader could not come into court and construe the contract in his favor and bind the court by the construction he placed upon it. But if it involved a question of intent, and the pleading conceded that the construction given to it by his adversary in the action was as he understood, it might be a question how far the court would allow him to gainsay it when he found it to his advantage to do so. This is presented, we presume, to relieve plaintiff in error from the construction it has made of the judgment and deed, and avail itself of any benefit it might have if this construction had not been made. They seem to concede that the judgment and deed is broader than the covenant upon which they are based, by arguing its effect as *res judicata*. While plaintiff in error seems willing to take the advantage of these conditions, if they really existed, the court would never so construe them, when it was at all *possible* to reconcile them with the covenant upon which they depended. Indeed the court would at once recur to the pleadings and see if there was any fraud or mistake alleged or issue presented to justify a re-formation of the covenant, and if not, the judgment to that extent would

be void. Really the sum and substance of the contention is, that even if the covenant and pleadings limited the rights of plaintiff in error to the Compromise Strip as a part of the Nine Hour Lode claim, and did not carry with it that part of the vein having its apex outside of it and inside of the Saint Louis claim, that some phraseology in the judgment gave it to them, and that the court will not go outside of the judgment and deed to ascertain what was really litigated so as to give the judgment and deed the proper construction. No better elucidation of this question can be had than the facts and circumstances of this case present. Under the law and decisions a quartz claim comprises the surface, and all lodes apexing within the surface (not belonging to a prior location) to their full dip, even though they dip under and beneath the claim of another, a deed has been made to reconvey the naked legel title by patent to the Saint Louis claim back to the Nine Hour as a part thereof, and by this judgment and deed it is claimed that the words "together with all the minerals therein contained" do not refer to, and are limited by, the surface conveyed, and apexing within it, but that a description of the surface by metes and bounds, made for the sole purpose of description, and which could be made in no other way, changes the meaning of the words "together with all the minerals therein contained," and makes them apply to said piece of land as if it were agricultural and not mineral. Now, it is claimed that the court will not look to the pleadings to ascertain whether these words, from the substance of the issue, shall be in-

terpreted as they should be in the conveyance of a quartz mining claim, or as they would be in the conveyance of a tract of land other than a mining claim. The covenant made a part of the pleadings, shows that it was to be conveyed and restored to the Nine Hour as a part of it, and further shows that the phrase "together with all minerals therein contained" did not include the part of the vein not belonging to the premises so restored. But above all the pleadings and covenant made a part of them, show that the strip was always a part of the Nine Hour lode, and that defendant in error and its predecessors in interest only held the naked legal title as trustees, and it is now claimed that by the deed and decree it was compelled to convey and restore not only the trust property, but some of its own, and that the court cannot resort to the pleadings to ascertain if this is true, and if so, whether the jurisdictional averments exist to warrant it. Recourse may be had to these for the purpose of ascertaining the object in describing the part of the claim by metes and bounds, and for the purpose of shewing that the subject matter of the litigation was to restore this title in the *trustee* to the *cestui qui trust* and to characterize the piece of land so conveyed. If the phrase referred to it as a part of a quartz claim, it leads to absurdities to say that by the survey and description by metes and bounds it lost, or was intended to lose its idiosyncrasies, so to speak, as a quartz mining claim, and there was imported into it thereby some element that took property never held in trust, and gave it to one who was

not a beneficiary in it. Under such circumstances the court will resort to the pleadings and findings upon which the deed is based to ascertain what was litigated, and apply the judgment to the subject matter upon which the adjudiciation was had. It is the duty of this court to determine whether the subject matter included in the judgment was a quartz mining claim or a piece of land *aliunde* such claim. This is not shown by the judgment alone, and it would be of no consequence if the estates were identical. But when the estate in the one instance carries with it only the surface, and excepts therefrom all veins apexing outside of it, although dipping beneath it, and in the other no extralateral rights exist, and the grantee takes all beneath the surface, the character of the property disposed of becomes of the utmost importance in applying both judgment and deed to their proper subject matter. In this way the *judgment* and *deed*, being silent as to this matter, are not changed or contradicted. By the pleadings of plaintiff in error the covenant and findings of the court, the subject matter adjudicated, and the application of the phrase "together with all the minerals therein contained," are limited and controlled by the character of the property involved. If it refers to a quartz lode it means one thing, and if a homestead entry, another. By the pleadings and findings it is demonstrated that the strip always was a part of the Nine Hour, and that under the covenant defendant held the bare legal title in trust, and that the intention was to convey and restore it to the beneficiary of the trust, and not to convey

any right or interest of the trustee in his own individual property.

Barnes vs. Chicago, Milwaukee, &c., 122 U. S. 1.
The American Co. vs. Bradford et al., 27 Cal., 360, 368.
Clay vs. Hildebrand, 34 Kan. 694.
Freeman on Judgments, Sec. 45.
Lewis vs. Smith, 9 N. Y. 502.

A suit to recover dower: defendants pleaded a decree foreclosing a mortgage executed by the husband of plaintiff. Plaintiff had not executed the mortgage, but the decree of foreclosure was against the plaintiff also. Held that the pleadings in the foreclosure suit could be resorted to, in order to determine the effect of the decree as against her.

Under the foregoing decisions, by reference to paragraphs 2 and 3 of the complaint, in the action in the state court wherein the deed was ordered to be executed, Record pp. 33 and 34 inclusive, it will be found that it was only the trust property that was in litigation, that that property was and always had been a part of the Nine Hour Lode claim, and that there is no allegation in the pleadings or findings in that case upon which to predicate a judgment for anything else.

Authorities are also cited to show that in some States, Missouri among others, the judgment operates *ipso facto* under the circumstances of this case, to convey the property, and that no deed was necessary. If this be true,

the findings referred to in it sustain the interpretation given to it by the court, and full faith and credit has consequently been accorded to it under the constitution and laws. If it was not restored to the Nine Hour as a part of a quartz claim, the phrase "and all minerals therein contained" might be of some significance, but as it is, it simply expresses what would otherwise be implied.

Counsel also insist that if the conveyance was to a stranger there would be no uncertainty in the deed so as to require the surrounding facts to aid in its interpretation. The conveyance of a town lot or piece of land by legal subdivisions might so characterize it as to preclude the idea that it was conveyed as a mining claim. So, also, the conveyance of a quartz mining claim might preclude the idea that it was conveyed as a town lot. Yet if the deed is silent, the character of the land conveyed and purposes of the conveyance would have much to do with the interpretation to be given the conveyance. If A owned a quartz claim adjoining B, and should sell it to C, "together with all the minerals therein contained," no reasonable claim could be asserted by C to the mineral contained in a vein apexing in B's claim because in its dip it passed beneath the claim conveyed to C. If we assume that A was the owner of two adjacent quartz claims and sold one to C "together with all the minerals therein contained," C would be in no better position to assert a claim to minerals apexing in A's remaining claim than he would if B had been the owner of it. How much more, then, would this be so if A held an adjoining claim

in trust for B, and simply conveyed and restored to him the legal title. The suggestion of the court below is that it would require language that would admit of no other construction to allow it to work out such results and deprive the adjacent owner of his extralateral right. Certainly describing the surface by metes and bounds would not do this. It would not change its identity as a quartz mining claim or part of one, and the mineral therein contained would unquestionably be limited to veins apexing within its boundary lines.

Applying these principles to the mining law, which is a conditional grant as well as a law, the term lands would be limited to the surface and veins, lodes and ledges upon said lands, and the veins, lodes or ledges are "the lands" referred to in which mineral deposits are found, and the *surface* is the *land* for which five dollars per acre is to be paid for the convenient working of the veins, lodes or ledges. And this likewise defines and limits a mining *claim or location*. The rights about which we are speaking are not reserved rights. The question simply is, what rights are conveyed by the grant, and the grantee is not in a situation under such grant to say "hands off" of anything except the granted premises and whatever else is indispensable for its enjoyment.

We have referred to the matter of title under the patent to the strip which defendant undertook to procure and deed back to plaintiffs in error, in order to show that no such title to all beneath the surface, as claimed by coun-

sel, could have been contemplated by the covenant, findings and judgment, and that the deed would be construed accordingly.

And so it is, both parties to the covenant expected the Saint Louis Company to get, by the patent, a title to the surface and the veins apexing therein, and nothing else. They contracted with reference to the title to be acquired by the patent, are charged with a knowledge of the law governing the estate to be granted by it, and must, consequently, have known that the phrase "together with all minerals therein" of necessity referred to minerals belonging to the surface conveyed. They could not, and did not expect the Saint Louis Company to get a title to the strip that would extend to the center of the earth and include everything beneath the surface within vertical planes extended downward upon the exterior boundary lines of the strip. They were charged with the knowledge of the exact title to be conveyed by the patent, and it was that self same surface which was to be restored to the Nine Hour, and none other. The words, therefore, "together with all the mineral therein contained" do not in any way enlarge the estate granted, but refer to and are limited by it.

The conclusion is that there is no covenant, pleadings or judgment to support the deed for anything but the trust property acquired by the patent, and that it must be limited in its operation accordingly. The trust is discharged by the execution of the deed and the strip is restored to the Nine Hour claim, of which it was always a

part, and has the precise status it would have had if the trust had never been created and had never been patented as part of the Saint Louis lode.

We recur again to the interpretation of the judgment by the pleadings and the covenant made a part of them, and the findings. If it is to be interpreted by these, not the slightest doubt can exist as to the intention of the court, and the Saint Louis Mining and Milling Company intended to do just what the court intended it should do in executing the deed. It was made by force of the judgment and to carry out the judgment; hence the purpose and object of the judgment must prevail, and it is the controlling element in the case. In Fowler vs. Doyle, 16 Iowa, 534, on pages 535 and 536, Dillon, J., speaking for the Court, says:

"It is proper in all cases, and in cases where the entry "is obscure, or not clear, it is necessary to read the record "entry in the light of the pleadings and of the entire "record. See, generally, on this subject, 1 Greenlief Ev., "Secs. 511, 514; Foot vs. Glover, 4 Blackf., 313; Bell vs. "Mossey, 14 La. Ann., 831; Hughes vs. Blake, 1 Mason, "514.

"Looking at the record entry alone, we would conclude "that it contained no judgment against Mary Ann Doyle. "If, then, upon the testimony which was before the Court, "it was clear that Michael Doyle had, in law, no interest "in the note, at the time the defendant was garnished, "it would follow that the latter could not be held as the "debtor of Michael."

So here by examining the pleadings, covenant and findings, it will clearly appear that the judgment was intended to cover and *could only cover* the trust property, *i. e.*, the strip of the Nine Hour claim, being all that was involved in the litigation.

To the same effect is Finnigan vs. Manchester, 14 Iowa, 521, 522; Beers vs. Shannon, 73 N. Y., 292, 296; Foot vs. Glover, 4 Blackf., 313. In Clay vs. Hilderbrand, 9 Pac., 466, 34 Kan. 694, the Court (p. 470) says:

"We think, however, that the judgment is open to an-
"other and a fairer interpretation, and one which will
"render it correct and proper; and wherever a judgment
"is open to two or more interpretations, that interpreta-
"tion should be given to it which will make it correct
"and proper, and which will make it correspond with
"the pleadings and the other proceedings in the case, and
"not an interpretation which will render it improper or
"erroneous."

The deed is based upon the judgment, and not the voluntary act of the grantor, and it will be assumed that the court construed it to conform to the judgment, and not that the pleadings, findings and judgment are controlled by the deed as claimed by counsel for plaintiff in error. It was never intended that the deed should broaden the effect given to the judgment by the covenant pleaded, the pleadings and finding, so as to include property rights not litigated. It will, therefore, be presumed that the court construed the deed to conform to these, and this Court will interpret it accordingly.

Herman on Estoppel, Vol. I, page 232, uses this language:

"It makes no difference whether the judgment is on a "question of law or fact, for whenever the construction of "an instrument has been judicially determined, it must "be followed in every other action where the same issue "arises between the same parties and those in privity "with them in law or estate."

Herman cites many authorities in support of his proposition, and counsel for plaintiff in error cites authorities to the same effect.

Defendant in error claims that the court construed the deed to conform to the pleadings, covenant, findings and judgment, while the contention of plaintiff in error is that the deed must speak for itself, and that the court intended the pleadings, covenant, findings and judgment from which it sprang, and upon which it depends for its very existence, to be controlled by it. The deed is a part of the court proceedings, and all the proceedings must be taken together in construing it.

The deed does not operate as the independent act of the parties. It was made under compulsion, and cannot be made the means of shutting out the antecedent proceedings, without which it would be as impossible for it to exist, as for the plant to flourish without the continued support of the soil from whence it sprang.

In Barnes vs. Chicago, M. & St. P. R. R. Co., 122 U. S., page 1, the court (p. 14) says:

"Every decree in a suit in equity must be considered "in connection with the pleadings, and, if its language "is broader than is required, it will be limited by con- "struction so that its effect shall be such, and such only, "as is needed for the purposes of the case that has been "made and the issues that have been decided. Graham "vs. Railroad Co., 3 Wall. 704."

This case is directly in point, and shows that the judgment cannot broaden the issues so as to include anything but the trust property, and that it will not be construed to include veins belonging to the trustee, *i. e.*, individually, and not to the *cestui qui trust*. The pleadings, covenant, findings and judgment clearly show that the defendant in error was to obtain the patent title in trust for plaintiff in error, for which reason the deed should not be construed to broaden the estate thus acquired, being a part of the proceedings in the enforcement of the trust, and referred to in the judgment. Defendant in error was sued as a trustee of the patent title and the subject of the action was the trust property, and the deed will be construed to include nothing else.

Brown, et al., v. Cranberry Iron & Coal Co., 59 Fed. 434.

In Merriam v. United States, 107 U. S., 437, the Court (page 441) uses this language:

"It is a fundamental rule that in the construction of contracts the courts may look not only to the language

employed, but to the subject matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made.

> "Nash v. Towne, 5 Wall., 689; Barreda vs. Silsbee, 21 How., 146-161; Shore v. Wilson, 9 Cl. & Fin., 355-555; McDonald vs. Longbottom, 1 El. & El., 977; Munford v. Gething, 29 L. J. C. P., 110; Carr v. Montefiore, 5 B. & S., 407; Brawley v. United States, 96 U. S., 168."

The deed is the result of a *series of events* detailed in the records of the court, and it will, under these authorities, be interpreted by them. The construction of a deed comes within the rule applicable to the construction of contracts.

> Reed v. Ins. Co., 95 U. S. 31.
> Miles v. Barrow, 122 Mass. 581.

The law in force at the time, Section 632, First Division, Compiled Statutes of Montana, reads:

"For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

For an interpretation of this section, a very able and forcible opinion of Blake, J., in

> Shreve v. Copper Bell M. Co., 11 Mont., at p. 323.

Acts of the parties under a deed or contract are always admissible in interpreting them and in showing the understanding of the actor. In this case, as shown by the record, plaintiff in error did not stop within the vertical planes extended downward upon the lines of the strip, but continued to extract the ore after the vein apexing within the Saint Louis claim had passed beyond those lines. By this it shows that it did not regard the deed, as it is termed, a common law deed, otherwise after blocking out the ore within the perpendicular planes through the lines of the compromise ground they would have left the balance in the vein for the defendant in error beyond those planes.

This deed cannot be considered as evidence of the intention of the grantor. It is the product of judicial proceedings and its purpose and operation must be limited and controlled by these. These proceedings show that its subject matter was a quartz claim, and that the property to be acquired and held by the patent, was to be held in trust, and that the whole purpose of the deed was to discharge the trust by the conveyance of the title acquired by the patent, and nothing else and no more.

The decision of the Supreme Court of the United States in Del Monte Mining & Milling Company v. Last Chance Mining & Milling Company, and the Circuit Court of Appeals in this case emphatically determine the title and estate defendant in error acquired under the patent, and the rights plaintiff in error has in the strip as a part of the Nine Hour Lode

Claim, and the deed should not be construed to include any other title or estate or convey or restore anything but the trust property acquired under the patent.

That the Court may more readily get at the facts showing that this contention is brought directly within the principles announced in the foregoing decisions, and the decisions of this Court, and that the purpose of the entire proceedings from the filing of the complaint in the action in which the State Court ordered the execution of the deed, up to and including the deed, was to enforce the trust on account of obtaining the legal title to the compromise strip by the patent issued therefor, which always was a part of the Nine Hour Lode Claim, and that the deed in its operation is in discharge of the trust and will be so construed, we quote from the complaint in the suit for specific performance, the covenant made a part of it, the findings of the court and judgment, such portions as bear upon the issues involved.

FROM COMPLAINT.

(Paragraph II, p. 33, et seq.)

"And the plaintiff further shows and alleges that on and prior to the seventh day of March, A. D. 1884, plaintiff's predecessors in interest, to-wit: one William Robinson, James Huggins and Frank P. Sterling, Warren De Camp and John W. Eddy, who were then and there all citizens of the United States and duly qualified mineral land claimants, were the owners of, in possession of, and

lawfully entitled to the use, occupation and possession of all and singular that piece or parcel of mining ground, comprising a portion of the Nine Hour Lode Mining Claim situate, lying and being in Ottawa (unorganized) Mining District, in the County of Lewis and Clarke, and State of Montana, more particularly described as follows, to-wit: * * * * together with all the mineral therein contained, * * * which said premises were then, and ever since the 26th day of July, 1880, have been a part of the Nine Hour Lode Mining Claim, so the property of the aforesaid predecessors in interest of this plaintiff and of which said portion and of the whole of said mining claim they were then and there the owners, in the actual possession, and entitled to the possession thereof. * * * And for the purpose of settling and agreeing upon the boundary line between the said Nine Hour Lode Mining Claim and the said Saint Louis Mining Claim, the said defendant, Charles Mayger, made, executed and delivered to said Robinson, Huggins and Sterling a certain bond for a deed in writing, whereby, in consideration of the compromise and settlement of said lawsuit and the withdrawal of said protest and adverse claim in the said land office, so that he might procure a United States patent, he thereby covenanted and agreed that when he should obtain such patent, and on demand of the said William Robinson, James Huggins and Frank P. Sterling, or their heirs or assigns, he would make, execute and deliver to them, their heirs or assigns, a good and sufficient deed of and for all the premises so above particularly

mentioned and described, a copy of which said bond for a deed is hereunto annexed, marked "Exhibit A," and hereby made a part of this complaint."

(From Paragraph III, p. 34.)

"That upon the execution of said bond for a deed the said predecessors in interest of this plaintiff were in possession of the premises above mentioned and described, and they and their successors in interest ever since have been and yet are in the possession thereof, holding, using and enjoying the same as a part and portion of said Nine Hour Lode Mining Claim."

(Paragraph IV, p. 34.)

"And plaintiff further shows and states that by mesne conveyance the title to the said Nine Hour Lode mining claim and the whole and every part thereof, including the portion thereof above particularly mentioned and described, has come to it, and it is now the owner thereof and in the possession and entitled to the possession of the whole and every part of said Nine Hour Lode Mining Claim."

(Paragraph V, p. 35.)

"And plaintiff further shows and states that not only has the defendant, Charles Mayger, refused and declined to comply with the request of the plaintiff that he make and execute to it a deed for the said premises above particularly described, as in and by said bond for a deed he covenanted and agreed to do, but on or about the 10th of June, A. D. 1893, for an alleged consideration of one

thousand dollars, he made, executed and delivered of and for said premises to the said defendant, the St. Louis Mining & Milling Company, of Montana, but plaintiff avers that at the date of the execution of the said deed the said defendant, the St. Louis Mining & Milling Company, of Montana, had full knowledge and notice of the making, execution and delivery of the said bond for a deed by its said co-defendant and of the rights and equities of plaintiff thereunder as being the successors in interest of the said Robinson, Huggins, Sterling and its other grantors."

(Record, p. 35.)

"Wherefore, the premises considered, plaintiff prays that by the proper order or decree of this court the said defendants be adjudged and decreed to make, execute and deliver to plaintiff a good and sufficient deed for the said premises above mentioned and described, and that in the event of their failure so to do the decree of this honorable court may have the force and effect of such deed; that plaintiff may have such other and further relief as may be in accordance with equity and good conscience, and that it have judgment for its costs."

FROM COVENANT EXHIBIT "A."

(From Record, p. 36, et seq.)

"The consideration of this obligation is such that, whereas, a certain cause now depending in the District Court of the Third Judicial district, Lewis and Clarke county, Montana, between William Robinson and James

Huggins, plaintiffs, and Charles Mayger, defendant, has been compromised and settled, and the said William Robinson and James Huggins have agreed to withdraw certain objections to the application of the said Charles Mayger for patent now pending in the United States Land office at Helena, Montana.

"Now, then, in consideration thereof, and the further consideration of one dollar to the said Charles Mayger in hand paid by the said William Robinson and James Huggins and Frank P. Sterling, the receipt of which is hereby confessed, hereby covenants, promises and agree to proceed at once upon his application now pending in the United States Land Office at Helena, Montana, for a patent to the Saint Louis claim, described therein, and situated in Lewis and Clarke County, Montana Territory, and procure as soon as practicable a government patent therefor, and when such title shall have been procured according to such application, the said Charles Mayger hereby covenants, promises and agrees, upon the demand of the said William Robinson and James Huggins and Frank P. Sterling, or their heirs or assigns, to make, execute and deliver to the said William Robinson, his heirs or assigns, a good and sufficient deed of conveyance of that certain lot, piece or parcel of mining ground situated in Lewis and Clarke County, Montana Territory, and comprising a part of two certain quartz lode mining claims known as the St. Louis Lode Claim and the Nine Hour Lode Claim, and particularly described as follows, to-wit: * * * * together with all the mineral there-

in contained; and if the said Charles Mayger, his heirs or assigns, shall make, execute and deliver the said deed of conveyance as by this agreement provided and intended, then this bond and agreement to be null and void; otherwise to be and remain in full force and effect."

FROM FINDINGS.

(Record, p. 41. Finding II.

"That on the seventh day of March, A. D. 1884, William Robinson, James Huggins, F. P. Sterling, Warren De Camp and John W. Eddy were the owners of, in possession and entitled to the possession of all and singular the Nine Hour Lode Claim, situate, lying and being in the Ottawa (unorganized) mining district in the county of Lewis and Clarke, state of Montana, and that the strip of ground called the 'compromise ground,' which is the subject of dispute in this action, was, at that time, and thereafter continued to be, a part of said Nine Hour Lode Mining claim."

(Finding III, Record, p. 41.)

"That prior to the date last aforesaid the said Charles F. Mayger had made application in the United States Land Office at Helena, Montana, for a patent to the said Saint Louis Lode Mining Claim, and had included in his application the said ground which is the subject of dispute in this action, and that thereupon the said Robinson and Huggins had made and filed in the land office a protest and adverse claim to the ground in dispute, and an

action had been instituted within the statutory time to determine the right to the possession of said premises in dispute, and as to who had the right to obtain patent therefor; which said action at said last aforesaid date was pending in the District Court of the Third Judicial District of Montana, within and for the County of Lewis and Clarke; that on the seventh day of March, A. D. 1884, the said Robinson, Huggins and Sterling, and the defendant, Charles F. Mayger, entered into the bond or obligation attached to the complaint herein, marked "Exhibit A," and that said obligation or bond was made and given for the purpose of settling and determining the action aforesaid and the controversies involved therein, and for the purpose of determining and fixing the boundary line between the said Nine Hour Lode Mining Claim and the St. Louis Lode Mining Claim owned by the said Mayger, the boundaries of which claims were in conflict aforesaid."

(Finding V, Record, p. 41.)

"That at the date of the execution of said bond the said Robinson, Huggins and Sterling, Eddy and DeCamp, were in the actual possession of the said compromise strip, and they and their successors in interest have ever since remained in the possession thereof, claiming and holding the same as a part of the said Nine Hour Lode Mining claim."

(Finding VI, Record, p. 41, 42.)

"That at the date of the execution and delivery of said bond it was expressly agreed between the parties thereto

that all of the ground lying to the east of the westerly line of the compromise strip should be a portion of the Nine Hour Lode Mining Claim."

FROM CONCLUSIONS OF LAW.

(I, Record, p. 43.)

"The plaintiff is entitled to a conveyance from the said defendant of and for the premises particularly mentioned and described in the said bond, known as the 'compromise ground.'"

FROM JUDGMENT (Record, p. 43.)

"And after due deliberation, the court having made and filed on the first day of June, 1895, its findings of fact and law in said case, and the issues having been found in favor of the plaintiff and against the defendants, and that the plaintiff is the owner of the *equitable and* entitled to the conveyance from the defendants of the legal title to the premises mentioned in the complaint and hereinafter described.

"Now, therefore, on motion of counsel for plaintiff, it is ordered, adjudged and decreed that the agreement set forth in the complaint herein, a copy whereof is attached to said complaint as an exhibit, be specifically performed, and that the defendant, the St. Louis Mining & Milling Company of Montana, within thirty days from and after the entry of this decree, execute and deliver to said plaintiff a good and sufficient conveyance in fee simple absolute, free from all encumbrances, of and for the

premises mentioned in the complaint and hereinafter described. The said conveyance shall be in form like the one hereunto annexed, and, upon the failure of said defendant within the time aforesaid so to make, execute and deliver such conveyance, then the clerk of this court is hereby appointed a commissioner, who, in the name and for and on behalf of said defendant, the St. Louis Mining & Milling Company of Montana, is hereby directed to execute a deed to said plaintiff for said premises, which, after reciting that it is so executed by said clerk as such commissioner for and on behalf of said defendant, shall be in form substantially like the one heretofore attached and approved, and, upon recording a duly certified copy of this decree, and of the said deed so executed by the said commissioner, in the office of the county recorder of the county of Lewis and Clarke and State of Montana, the same shall have the force and effect of a conveyance of the said title from said defendants to the said plaintiff; that the said defendants and all persons claiming under them or either of them be forever barred from all interest or claim to the said premises, or to any part or portion thereof, or to the possession of the same or any part thereof.

"The premises affected by this decree and so to be conveyed are more specifically bounded and described as follows, to-wit: * * * * together with all the mineral therein contained."

FROM THE DEED

Which is "Exhibit A" annexed to the Answer, (Record p. 10.)

"That the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to it in hand paid, the receipt whereof is hereby confessed, has granted, bargained, sold, remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part, and to its assigns forever, all and singular those certain premises, situate, lying and being in Ottawa (unorganized) mining district, in the county of Lewis and Clarke and State of Montana, more particularly bounded and described as follows, to-wit: (Here follows a description of the same as contained in the covenant and judgment.) Together with all the mineral therein contained. Together with all the dips, spurs, angles, and also all the metals, ores, gold and silver bearing quartz rock and earth therein, and all the rights, privileges and franchises thereto incident, appended or appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining, and the rents, issues and profits therein, and also all and every right, title, interest, property, possession claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises and every part and parcel thereof, with appurtenances.

"To have and to hold all and singular the said premises, with the appurtenances and privileges thereto incident, unto the said party of the second part and its assigns forever."

It is axiomatic that the deed conveys the strip as a part of the Nine Hour Lode, and does not deprive the St. Louis Lode of any of its extralateral rights, and that the phrase "together with all the minerals therein contained" refers only to such minerals as it is entitled to as a part of the Nine Hour Claim, and that defendant in error intended by the deed just what the court intended it to be, as shown by the proceedings in the case; and that the deed, being silent as to this matter, is fully interpreted and explained by said proceedings upon which it is based.

To cite authorities to the effect that defendant in error could only be required to transfer the naked legal title acquired in trust through the patent, and that by so doing the legal and equitable title is merged in the *cestui qui trust* and the trust discharged, would be useless and unnecessary. The record shows that this has been done, and that the effort of plaintiff in error to acquire a part of the individual interest of the trustees in the St. Louis claim is in a measure reprehensible.

We respectfully submit that there is no repugnancy in the complaint, and that it properly construes the deed in accordance with the authorities cited.

The effect of this deed is raised in only three assignments of error, to wit, 10, 11 and 12.

The objection to the introduction of the exhibits mentioned in Assignments of Error 10, 11 and 12 on the ground that they were not in rebuttal is not well taken; first, because the plaintiff in error objected to their being introduced upon the opening of the case for the reason that if they were proper evidence at all they should be introduced in rebuttal, and further for the reason that it was within the discretion of the court to allow us to introduce them at any time. And further, the assignment is not well taken because the papers were admissible in evidence to show the surrounding circumstances as appears in the case of Stinchfield against Gillis and other authorities already cited in this brief.

Assignments 11 and 12 cannot prevail. These instructions would include blocks of ore some of which are between the planes mentioned in the complaint and not within the terms of the deed however broad the interpretation of that paper may be made. An inspection of the map (plaintiff's ex. 1) will show one block of ore so taken to have been entirely north of the 30 foot strip, another entirely east of the 30 foot strip and another entirely west of the 30 foot strip and entirely within the surface boundaries of the St. Louis ground exclusive of that strip.

And, moreover, our contention is that the deed when interpreted in the light of the surrounding circumstances, cannot be construed to convey any right to the plaintiff in error which its predecessor in interest did not have by virtue of the location of the Nine Hour; that location

was subsequent to that of the St. Louis and could not include any portion of the vein in controversy.

IV.

POSSESSION.

The defendant, the plaintiff in error, contends that the possession of the apex is not sufficient possession to maintain trespass, but is a mere constructive possession. The statutes of the United States would seem to determine that whoever had possession of the apex had actual possession of the whole of the vein therein. There is nothing discriminating as to constructive possession as contrary to actual possession. The difference between mining property and agricultural property is only in the direction of the descent into the earth. One descends vertically the other follows the vein—the actual occupancy may be only on the surface but the possession below the surface is in each case actual not constructive.

An expression in Iron Silver Mining Co. vs. Cheesman, 116 U. S. 533, would seem to sustain our contention:

> "It is obvious that the vein, lode or ledge of which the locator may have 'the exclusive right of possession and enjoyment' is one whose apex is found inside of his surface lines extended vertically; and his right follows such vein, though in extending downward it may depart from a perpendicular and extend laterally outside of the vertical lines of such surface location."

The case cited by counsel himself holds to the contrary of his contention; in Pardee vs. Murray, 4 Montana 234-277, the court says as follows:

"The possession of the respondent was sufficient to maintain this action. He had possession of the surface ground, and such possession gave him possession of all veins, lodes and ledges through their entire depth, the tops or apexes of which lie inside of the surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of the surface location. U. S. R. S. Sec. 2320.

"Possession of the surface of a mining claim location is possession of all veins, lodes and ledges, the tops or apexes of which are inside the surface lines, altthough such veins, lodes and ledges, as they go downward, may extend outside such surfact lines; and possession of the surface ground protects such veins, lodes and ledges from the operation of the statute of limitation."

"The possession of a vein recognized by the mining laws, and to which protection is given, is by one who holds the surface where the vein makes its apex."

Eilers vs. Boatman, 3 Utah, 167. Affirmed 111 U. S. 356.

It may be that, in the absence of proof as to where the apex is, the presumption is that he who owns the surface owns all that is below; but when the vein—the apex—is shown to be in the mining claim of "A", then he is presumed to be in possession of so much of the dip of the vein as lies between perpendicular planes passed through his end lines.

The claim of the plaintiff in error that the court in the decree for specific performance declared that the defendant was in possession is unfounded in fact. The court was finding as to the possession of the Nine Hour Claim and because of such possession that the plaintiff therein was the successor of the grantees in the bond and the court found that they were in possession "as a part of the Nine Hour Lode." Counsel in his quotation omits the quoted line, which gives all the point there was to the finding.

The case of Hugunin vs. McCunniff, 14 Morrison, Min. Rep. 463 does not hold, as contended, that the possession of the apex is a mere constructive possession only, but it did hold in that case that one of the parties had a constructive possession, only because he did not take possession under his deed given to him by the opposite party and that the mere reception of the deed unaccompanied by any actual occupancy was mere constructive possession. The constant practice in these mining claims is for the owner of the apex to maintain the trespass. Thousands of cases could be found where such action has been maintained. While mere absence of holding or of any

question raised is not perhaps conclusive, it certainly should have much weight in cases like this. The constant practice of maintaining trespass for veins in which the possession is that of surface possession of the apex has practically settled the law in favor of such right. This question is settled by the pleadings.

In paragraph 2 of the complaint (record p. 1) the plaintiff alleges that he is the owner of, entitled to and in the actual possession and occupation of * * * "any and all veins * * * through their entire depth the top or apexes of which lie within the surface lines," end of quotation: paragraph 1 of the answer (record p. 7) "admits the allegations contained in paragraphs numbered 1, 2 and 3 of the * * * * complaint."

V.

MITIGATION OF DAMAGES.

In the 13th assignment of error the plaintiff in error claims that the damages should be mitigated in some manner, upon the hypothesis of the supposed facts therein stated. The facts assumed in the request were unfounded and there was no evidence whatever tending to prove them. The instruction was therefore rightly refused for that reason. The assumption of the facts in the request is that the ore was mined and preserved and that the defendant, plaintiff in error, has the ore now ready to be delivered to plaintiff in good condition. The ore in those blocks was not preserved by itself. The testimony of the plaintiff tended to shown how much there was in each

block. The testimony of the defendant showed that a part of it, forty or fifty tons had been milled, that is used by the defendant and sold (Record page 30); that another portion of it had been dumped down into that part of the mine to which the plaintiff had no access. That any was stored ready to be delivered was not proven, and no definite statement of the amount of tonnage was given of any ore preserved so that there was nothing upon which the court could charge such a request. It would have been misleading under the circumstances of the case. But in addition to that objection the law is incorrectly stated. A mere fact of preserving ore would not justify the deduction of the price thereof from the recovery for damages. We bring an action of trespass for injury to the land to the extent of the value of the ore. Nothing would mitigate the damages except a return and acceptance of the ore itself. Here there was no return, no acceptance, no tender of any return. There is nothing in the transaction to mitigate the damages in the least.

3 Sutherland on Damages, 481-482.

VI.

The defendant complains in the 8th assignment of error that the plaintiff was allowed to prove that the defendant ran the 400 foot level through the vein or along the vein. There seems to be no claim in the brief however, of any injury therefrom; certainly no damages were allowed for it. None were claimed and none were allowed in the charge, and for aught that appears, the jury

were informed that no damages could be recovered for it. It was competent, however, for us to show that they were entering upon our property. The vein was the property of the plaintiff, and any trespass upon it, whether with or without injury, entitled the plaintiff to nominal damages.

VII.

The last assignment of error upon which the plaintiff in error bases any argument is the instruction given by the Court, as follows:

> "The evidence in the case shows that the discovery vein of the St. Louis claim extends substantially from one end line to the other lengthwise of the claim; that it dips to the east, and there is another vein having a section of its apex wholly within the St. Louis claim, between the planes known as the 520 and 108."

The witnesses Parks and Jenney had so testified, and there was absolutely no evidence to the contrary. That was one of the facts involved in the issues in the case; there being no dispute as to this fact, it was proper for the Court to instruct the jury to that effect.

In the United States Circuit Court the Judge has power to instruct the jury not only that one fact has been, but that all facts have been proved, and this as well for the plaintiff as for the defendant. The Court at the close of the testimony where the undisputed evidence establishes facts not sufficient to constitute a cause of action,

may so charge the jury and direct it to bring in a verdict for the defendant.

And, equally, where the undisputed evidence establishes facts constituting a cause of action in favor of plaintiff, and no evidence is given tending to prove a defense thereto, the court may so charge the jury; charge the jury not only as to one issue, but direct it to bring in a verdict for plaintiff.

North Penn. R. R. Co. vs. Commercial Bank, 173 U. S. 727.

Deleware, etc., R. R. Co. vs. Converse 139 U. S. 85.

In the case of Pucker vs. Wheeler, 127 U. S. 85 cited by counsel, the court, speaking of an instruction which left it for the jury to say whether or not there was any evidence upon one of the issues, used this language on page 44:

> "Indeed, we are not sure but the court might properly have given a peremptory instruction in favor of the defendant upon this branch of the case."

VIII.

No argument was made in the Circuit Court of Appeals by counsel in their brief under the assignment of error XV; so we presume that the point is abandoned. However, there was no error in refusing to charge the jury as requested by plaintiff in error in the instruction which forms the ground of that assignment. It absolutely took away from the jury the question as to whether

or not the trespass was willful, and there was evidence sufficient to justify the jury to find that the trespass was willful, and in such a case, the jury, in estimating the damages sustained, would not be confined to the value of the ore as it stood in the mine.

Wooden-Ware Co. vs. U. S. 106 U. S. 432.

Lindley on Mines, Vol. 2, 1129 et seq. and authorities cited.

St. Clair vs. Cash Gold M. & M. Co., 47 Pac. 466.

Cheesman vs. Shreve, 40 Fed. 787.

IX.

No argument was made by counsel for plaintiff in error in the Circuit Court of Appeals under assignment of error No. XVII.—That was an instruction given by the court; and the law as therein stated is correct.

The Antoine Co. vs. The Ridge Co., 23 Cal. 219 and authorities last above cited.

Counsel for defendant have raised in their brief in this Court a new objection to instruction No. 1: see their brief p. 61. They draw a distinction between the words "portion" of a vein, and the word "section" of a vein.

While it is true that the complaint does allege "That the dip of one of the veins having a portion of its top or apex inside," etc.—it is equally true that the complaint shows, as to that portion of the vein involved in case No. 213, that it has its entire apex within the St. Louis claim: the description of this vein shows that at the 520 foot plane the whole vein (foot wall and hanging

wall) is within our surface, and that the vein there travels in a southerly direction within that surface until the hanging wall crosses the side line at the 108 foot plane; and the instruction was limited to these two planes. So it will be seen that the instruction was properly given—1st, because it was alleged in the complaint; 2nd, because it was proved by the evidence and no evidence was given to the contrary, that the vein did have a section of its apex wholly within the St. Louis Claim.

CASE NO. 214.

FACTS.

The facts in this branch of the case are exactly the same as those in 213; except that in the trial Court the decision was against the St. Louis Company and the writ of error was taken by that company, the case was argued in the Circuit Court of Appeals, and our exceptions were sustained. Consequently none of the exceptions relied upon by the plaintiff in error are involved—although the effect of the compromise deed is more or less involved.

The plaintiff (defendant in error) offered at the trial to prove the amount of ore taken by the defendant from that portion of the vein which has its apex between the 108 foot plane and the 133 foot plane on its dip—the offer was made first, as to ore taken by the defendant from that portion of the dip of the vein between these planes and easterly of the west side line of the Compromise Ground or Thirty Foot Strip (see page 19, and Assignments of Error 1 and 4, Record pages 42 and 43, Record in

case No. 214); and second, an offer was separately made to prove the amount of ore taken from the vein on its dip between the same planes, but entirely to the east of the Compromise Ground, that is to say, underneath the surface of the Nine Hour Claim exclusive of the Thirty Foot Strip; the offer referred particularly to a block of ore known as Block No. 3, which was taken out of the vein between the planes mentioned and east of the Compromise Ground (see page 21 of Record in case No. 214, and Assignment of Error No. II, Record page 42 of Record in case No. 214.)

In each instance the Court refused to admit the testimony; and these rulings were reversed by the Circuit Court of Appeals and the cause was "remanded for a new trial as to the damages alleged and recovery sought for conversion of ore between the planes indicated". See Record, p. 54.

In the plaintiff's case in chief, plaintiff offered to show the circumstances surrounding the execution of the deed above referred to; to this evidence the defendant objected upon the ground that "if that is evidence anywhere it is evidence in rebuttal and not on the direct case", which objection was sustained by the Court (all of which appears on page 17 in Record in case No. 214); and for the same purpose plaintiff offered in evidence the judgment roll in the suit for specific performance, which was objected to upon the same ground, with the same ruling (p. 18). On the rebuttal the evidence was admitted. In this connection it must be remembered that the answer set

out the agreement to convey, the suit to compel specific performance and the decree in that suit, and it also alleges that the deed was given (see pp. 7 and 8); and it must be also remembered that the replication admits the execution of the said agreement, the judgment and deed, but alleges the facts surrounding the execution of the agreement, and also alleges the findings and judgment of the Court in the suit for specific performance (see pages 12 to 14), which facts, findings and judgment are hereinabove set out. The stipulation referred to in the offer is that mentioned on page 39 and which in effect waives any objection to the papers offered which might be based upon the ground that the papers were not certified or authenticated as required by law.

It will also appear from the evidence of the witness Keerl that the lines designated as the 520, the 108 and the 133 foot parallel end lines are lines which are drawn parallel to the end lines of the St. Louis claim and within the surface ground of the St. Louis Claim. (See pp. 17 and 18 and Map in our motion to dismiss the appeal.

There are three questions and only three, that are of any great importance; and they are as follows:

1st. What effect is to be given to the Deed to the Compromise Ground, or Thirty Foot Strip, under all the circumstances surrounding the execution and delivery of the deed?

2nd. Given a mining claim so located that its "located" or "discovery" vein (the vein upon which the loca-

tion was made) travels in its course lengthwise with the claim—actually crosses both end lines, and lies parallel with the side lines, of the claim:—when an extra vein, or a by-vein,—a vein other than the discovery vein also lies within such claim, entering at the northerly part of one side line, thence traveling in a southerly direction, almost parallel with that side line and wholly within the surface ground of the claim until the hanging wall departs therefrom at a point at least 710 feet from the point at which it enters, the foot wall being wholly within said claim for a much greater distance,—under these facts, which claim owns that portion of the vein the apex of which, at the points of departure at the southerly end, is partly within the senior location and partly within the junior location—what planes determine the extralateral rights of the senior location in and to the "by-vein" or "extra vein"?

3rd. The judgment of the Circuit Court of Appeals not being final, this appeal should be dismissed.

In considering this subject, we must determine what are the rights of the St. Louis Company, irrespective of the compromise deed to the thirty foot strip, and as through the St. Louis Claim as patented did not include the Compromise Ground.

Under those circumstances, what would be the rights of the plaintiff in error with regard to the Drum Lummon Vein?

Briefly stated the facts would be as follows: The St.

Louis Claim is a mining claim having a discovery vein running lengthwise of the claim as located and patented; consequently, the end lines of the claim as located would be the actual end lines of the claim; that is to say, they would be the lines which determine the direction of the planes which limit and control the right of the owner to follow the discovery vein on its dip, although such vein may so far depart from a perpendicular in its course downward as to extend outside of the vertical side lines of the surface of the St. Louis claim.

It is also well settled that the end lines which control and limit the extralateral right of the discovery vein are the end lines or planes which control and limit the extralateral right for every vein having its apex within the surface limits of the claim; therefore, still considering this question as though the St. Louis claim as patented had never included the Compromise Ground, it would seem quite clear that the St. Louis claim was entitled to all of the Drum Lummon vein between perpendicular planes passed through its end lines.

See Del Monte M. Co., vs. Last Chance M. C., 171 U. S., 57.

Walrath vs. Champion Mining Co., 171 U. S., 293.

It seems to us that there can be no doubt that these propositions are asserted by the two cases referred to. It seems to us that they hold that given a mining claim, it is entitled to follow all veins having their apexes within the surface grounds of the claim, to follow such veins on

their course downward and between the end lines of the claim, and that the owner of a mine is not limited in his right to work the claim on the dip by planes passed through the point of intersection of the vein with any side line of the claim. At the bottom of page 85, in the Del Monte case, the Court uses this language:

"All that comes fairly within the scope of the question before us is the right of the owners of the Last Chance to pursue the vein as it dips into the earth westwardly between the line *a d t* and the line *r s*, and to appropriate so much of it as is not held by the prior location of the New York."

If the line *e h* is prolonged, it will be found that there is no portion of that vein between the line *a d t* and the line *r s*, which has its apex in the New York, and that the words "so much of it as is not held by the prior location of the New York" can apply only to ore contained between the line *r s* and the line *e h* extended, and that portion of the vein does not have its apex within the New York, so that it is quite apparent that the Court in that case does give to the New York a portion of the vein on its dip which does not have its apex within the surface boundaries of the New York.

Now, referring to the Walrath case we meet this same proposition. On page 299, at the bottom, it appears that the trial court held that the line *g-h* and *a-p*, in the figure on page 295, constituted the end lines. But the same Court, notwithstanding this holding, in entering the de-

cree established the line *f-g* as the end line of the vein, and, quoting the exact words, "established this line as an end line of the Contact vein, but for its length only," and the Circuit Court of Appeals decided that the line *g-h-h* was the line which controlled the rights of the owner of the Providence Mine, and thus included a part of the Contact vein which had its apex outside of the surface boundaries of the Providence Mine.

But in this case the plaintiff (defendant in error) has not claimed ownership of any portion of the vein which has not at least a portion of its apex within the surface boundaries of the St. Louis claim: the portion of the vein involved in this controversy has a portion of its apex in the St. Louis Claim and a portion thereof in that portion of the Nine Hour Claim which is known as the Compromise Ground; and the St. Louis Claim being the prior in right, as to discovery, location and patent, it would have the prior right to the "Split Vein", even if that vein had been the discovery vein, and so "Split" by the side line from one end of the claim to the other.

> Bullion, Beck and Champion M. Co. vs. Eureka M. Co., 5 Utah, 3.

What then was the effect of the deed to the compromise strip executed under the order of the Court, and can the plaintiff in error show the circumstances surrounding the execution of the deed?

This point has already been argued to this Court in this brief.

It is claimed however by counsel for defendant that inasmuch as the vein enters and departs through the same line, there can be no extralateral rights to the vein on its dip. We do not consider that this proposition is correct.

We do not believe that even if this were the discovery vein that the rule of law for which counsel contends is correct, for even if this were the discovery vein, it runs lengthwise with the claim as located, its general course and direction is with the length of the vein as located and not crosswise thereof, and that would be enough to bring the case within the rules announced in the Del Monte case, for there is no law which requires that the located vein shall cross any line whatever. There is no law which prohibits it from entering a side line and crossing an end line, and no law which prohibits it from entering a side line and departing from the claim through the same side line. The course of the vein and its general direction, when that is shown, determine what are side lines and what are end lines, and that irrespective of any lines which it may or may not cross. (See the Del Monte case.)

However, this is not the discovery vein, as appears from the testimony of the witness Mayger, the witness Jenney, and the witness Parks (pp. 16, 17, 20, 21 and 22, Record in case No. 214). The discovery vein itself determines which are the end lines of the claim, as we have already said, and which are the side lines, and in this case it is shown from the evidence of the witnesses that the end

lines are those so declared to be by the locator of the claim by virtue of the location of the claim.

The owner of the St. Louis claim is entitled not only to the discovery vein, but to all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward and vertically, and, to quote from the Del Monte case:

> "Every vein whose apex is within the vertical limits of his surface lines passes to him by virtue of his location. He is not limited to only those veins which extend from one end line to another, or from one side line to another, or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines. Not only is he entitled to all veins whose apexes are within such limits, but he is entitled to them throughout their entire depth, 'although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.' In other words, given a vein whose apex is within his surface limits he can pursue that vein as far as he pleases in its downward course outside the vertical side lines. But he can pursue the vein in its depth only outside the vertical side lines of his location, for the statute provides that the 'right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as

above described, through the end lines of their locations," etc.

Now, where is it found in this statute that, given a regularly located mining claim with the discovery vein running with the side lines of the claim in its general course, that the right of the owner of such claim is confined to such veins only as in their general course run lengthwise of the claim? Where is it to be found in the statute that his right to veins other than discovery vein is limited to any particular class of veins, or to any veins running in any particular way in their course or direction? The statute says that he is entitled to all veins, the top or apex of which lies inside of his surface lines extended downward vertically. All veins would include a vein which passes through both end lines, and it would also include a vein the top or apex of which is within the vertical side lines, although such a vein might in its course cross the same side line. This doctrine is, as we assert it, laid down in the case of Champion Mining Co. vs. Walrath, where, however, it is extended, so that the right to follow such a vein, even though it be not the discovery vein, is bounded only by planes passed through the end lines of the claim as such end lines are determined by the discovery vein.

It must be quite apparent that irrespective of the deed the right of the defendant in error to follow the vein in question between the planes is absolute, because it is a vein other than the discovery vein, having its top or apex within the surface boundaries of the St. Louis claim,

and the portion in question is well within the end lines of the claim.

What effect then did the deed have? Our contention is that the deed, when interpreted in the light of the surrounding circumstances, cannot be construed to convey any right to the plaintiff in error which its predecessor in interest did not have by virtue of the location of the Nine Hour; that location was subsequent to that of the St. Louis and could not include any portion of the vein in controversy.

In addition to the argument already made in this brief as to the effect of the deed, we call the attention of the court to one line of argument which was not made before, and also to a question which is involved in this branch of the case and which would not be reached by the decision upon the former argument.

First—In the former argument we neglected to call to the attention of the court that by the very terms of the decision and the findings of the state court in the case for specific performance it was declared that the agreement to execute this deed was made for the purpose of determining the boundary lines between the claims as well as to determine that the "compromise ground" was and always had been a part of the "Nine Hour Claim, and never a part of the St. Louis Claim. Now, then, it becomes quite important to consider what was the boundary line so agreed upon. If it had been an end line or a boundary line which was an end line,

there could be no doubt that that would determine extralateral rights, but, as a matter of fact, this boundary line which was agreed upon by the parties was the side line of the two claims, the east side line of the St. Louis claim and the west side line of the Nine Hour claim. It is quite apparent, then, that it being a side line which was established, it was not the intent of the parties to control the extralateral right of either of the parties to the agreement, because side lines have no effect upon extralateral rights.

The next point which we add to this question in addition to that already taken by us in this brief is this: If the deed to the Compromise Ground is to be interpreted as a common law deed, that is to say, so interpreted as to convey mineral in veins having their apexes outside of the Compromise Ground and within the surface boundaries of the St. Louis claim, then it must follow that it cannot be both a common law deed and a mining deed. If it conveys mineral in a vein having the apex of that portion of the vein in the St. Louis ground, it must be a common law deed, and the mineral so conveyed must be mineral which is contained underneath the surface ground of the compromise strip and within perpendicular planes passed through all of the lines of the compromise strip. Consequently if that is the meaning of the deed, and if that is the effect of the deed, it cannot convey any portion of the Drum Lummon vein having its apex within the St. Louis ground which portion is easterly of the east side line of the Thirty Foot Strip or compromise ground. To

put it in another way: Assuming that the deed to the compromise ground is a common law deed, then we reach this result: the plaintiff in error by virtue of its location, recordation and patenting of the claim was entitled and is entitled to all of the Drum Lummon vein having its apex within the planes mentioned, and that portion of the vein between the said planes to whatever depth, and by virtue of this so-called common law deed it conveyed to the defendant such a segment of that vein as is included within perpendicular planes passed through each and every of the lines of the Thirty Foot Strip, for we certainly did obtain patent and title to all that portion of the vein, and if we conveyed any portion of it, if any portion of it is to be considered as granted by the deed by virtue of the expression therein contained to the effect "together with all minerals therein contained", then the only mineral therein contained, even under the contention of counsel for defendant, would be the mineral contained within the perpendicular planes passed through all of the boundary lines of the compromise strip; for surely the defendant cannot lay claim to any portion of the vein between the 108 and 133 planes by virtue of any apex or by virtue of any right growing out of the ownership of the surface or by virtue of any law of the United States, and if it has any claim under the deed by virtue of the phrase so much relied upon, then it must be by virtue of the common law effect of the deed, and certainly the common law would convey no mineral not perpendicularly under the surface of the compromise ground. But

the whole theory of a common law deed as applied to the deed in question is to us absolutely absurd. We must construe this deed with reference to the subject which was known to both parties. In construing a deed to a mining claim it must always be remembered that the common law rights are not the rights of a mining claim, but that the owner of a mining claim has in some respects more and in some respects less rights than are ordinarily granted by a common law deed.

JURISDICTION OF THE FEDERAL COURT:

In a motion to dismiss the appeal in each of the Cases No. 213 and 214, we have already filed a brief raising the point that there was no Federal Question in either cause —and that, in Case No. 214, the judgment appealed from is in no sense a final judgment.

As the jurisdiction of the Federal Court is always a question which can be raised at any stage of a case, we submit the following:

There can be no doubt of the jurisdiction of the Circuit Court on the ground that the controversy is one between a foreign citizen or subject, and a citizen of the State of Montana.

It is true that the summons shows that there were parties defendant other than Montana Mining Company, Limited;—but it is equally true from the very nature of the action, which is an action for trespass upon real property, that they were not necessary parties to an

action brought to obtain a judgment against the defendant the Montana Mining Company, Limited.

The plaintff in error had the right to so amend its complaint, as to dismiss the action as to all defendants not indispensable parties; and as to the wrong complained of an action could have been brought against any trespasser, or any one aiding such trespasser. The right to amend the complaint so as to show jurisdiction in the Circuit Court, has been recognized in many cases decided in this Court; and that the defendant herein was, from the very nature of the case, the only necessary party defendant is settled in the following case:

Powers vs. Chesapeake & O. R. Co., 169 U. S. 92.

The amended complaint shows the fact that the plaintiff at all times mentioned in the complaint and at the time of filing such complaint was a corporation duly organized and existing under the laws of the State of Montana, and that during all of said time the defendant was a foreign corporation incorporated under the laws of Great Britain", etc.

Similar allegations have by this court been held sufficient as to the plaintiff corporation; and the sufficiency of the allegation as to the foreign corporation is sustained by the following cases.

Barrow Steamship Co. v. Kane, 170 U. S. 101.

National Steamship Co. v. Tugman, 106 U. S. 121.

Our conclusions are:—

First: That the appeal in each of the cases should be dismissed.

Second: That the judgment of the Circuit Court of Appeals in each of the cases should be affirmed on the merits.

All of which is respectfully submitted.

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Supreme Court of the United States.

Nos. 213 and 214.—October Term, 1901.

The Montana Mining Company, Limited, Plaintiff in Error, 213 *vs.* The St. Louis Mining and Milling Company of Montana.	In error to the United States Circuit Court of Appeals for the Ninth Circuit.
The Montana Mining Company, Limited, Plaintiff in Error, 214 *vs.* The St. Louis Mining and Milling Company of Montana.	

[May 19, 1902.]

This was an action brought by the St. Louis Mining and Milling Company of Montana against the Montana Mining Company in the Circuit Court of the United States for the District of Montana, to recover damages for trespass on a vein of rock, having its apex entirely within the described premises of plaintiff, and extracting therefrom and converting large quantities of valuable ore.

The cause was tried on a second amended and supplemental complaint, which was filed June 26, 1899, and is set forth in the record, but the original complaint and the amended complaint are not. The record contains the original summons dated September 18, 1893, which ran against the Montana company; and sundry individuals, whose citizenship was not stated, though it appeared that they were served in Lewis and Clarke County, Montana, but who seem to have disappeared as parties in the progress of the cause, and who are not parties to the complaint contained in the record.

The first paragraph of the second amended and supplemental complaint alleged—

"That at the several dates hereinafter mentioned this plaintiff was, and now is, a corporation duly organized and existing under the laws of the then Territory (now State) of Montana, under the corporate name of St. Louis Mining & Milling Company of Montana, and as such was and is entitled to own, enjoy, and possess mining property in the said State, with all the rights, privileges, and immunities incident and appurtenant thereto; and that at said dates the said defendant, Montana Mining Company, Limited, was and now is a foreign corporation, incorporated under the laws of Great Britain, and, as such corporation, by virtue of its compliance with the laws of the then Territory (now State) of Montana, was and is entitled and authorized to do and transact business in said State."

The second paragraph alleged plaintiff "to be the owner of, entitled to, and in the actual possession and occupation of that certain quartz lode mining claim known as the St. Louis Quartz lode mining claim, and all the quartz, rock and ore and precious metals contained in any and all veins, lodes and ledges of mineral-bearing rock through their entire depth, the tops or apexes of which lie within the surface lines of the said fractional portion of said St. Louis lode mining claim, although such veins, lodes or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side line of the surface of the said St. Louis Quartz lode mining claim," situated in the county of Lewis and Clarke, Montana, and more particularly described as follows: [Here followed a full description, concluding] "Save and except that portion thereof known as the thirty-foot strip or compromise ground which belongs to and is a part and portion of what is known and designated as the Nine Hour lode mining claim, which said fractional portion of said St. Louis lode mining claim is described as follows, to wit: [Here followed description.]

The third and fourth paragraphs were as follows:

"III. That the said defendant, Montana Mining Company, Limited, is and was the owner of what is known and designated as the Nine Hour Quartz lode mining claim, situate and being east of the said St. Louis lode mining claim, and including the 30-foot strip or compromise ground aforesaid, and that the discovery, location and recordation of the said St. Louis lode mining claim and the United States patent therefor was made prior to the discovery, location and recordation and patent to the said Nine Hour lode mining claim.

"IV. That the dip of one of the veins having a portion of its top or apex inside of the surface location and patented ground of the said St. Louis mining claim is to the east and dips under and beneath the said Nine Hour lode mining claim, including the said thirty-foot strip or the compromise ground, which is a part and portion of the said Nine Hour Quartz lode mining claim, which said portion of said vein has its top or apex within the said St. Louis mining claim as follows, to wit: Commencing at a projected parallel end line of said St. Louis Quartz lode mining claim, at a point on the east side line thereof, between corners Nos. 1 and 2, extended vertically downward, whereat it passes through the hanging wall of said vein, lode, or ledge, at a point from which corner No. 1, being the northeast corner of said St. Louis Quartz lode mining claim, bears north 12 degrees 15 minutes east, distant 520 feet, where said hanging wall is disclosed at the surface by an upraise of said projected parallel end line, 5 feet west of the east side line of said St. Louis Quartz lode mining claim; thence, from where the said projected parallel end line passes through said east side line of said claim, and along the east side line of the said claim between corners Nos. 1 and 2, south 21 degrees 15 minutes west, 512.7 feet to a point, being the intersection of the said east side line of said St. Louis Quartz lode mining claim, between corners Nos. 1 and 2, with the west line of the said thirty-foot strip hereinbefore described; thence south 59 degrees 50 minutes west 108 feet and along the west line of the

said thirty-foot strip, to a projected parallel end line of said St. Louis Quartz lode mining claim, extended vertically downward, which passes through the hanging wall of said vein at the surface and at the crossing of the said hanging wall with the west line of the said thirty-foot strip.

"That it is also the owner of, in possession and entitled to the possession of an additional portion of the said apex of said claim lying to the south of the southern point hereinbefore mentioned, a distance of twenty-five feet, whereat the foot wall of the said vein passes out of the east side line of the said St. Louis lode mining claim.

"A map or plat showing the point at which the said vein enters said St. Louis lode mining claim as so hereinbefore described, and whereat the same departs therefrom upon the east line of said claim is hereto attached, marked Exhibit 'A,' and made a part of this complaint, and to which reference is made."

The Montana Mining Company answered June 30, 1899, in three paragraphs, the first admitting the allegations of paragraphs numbered one, two and three of the second amended and supplemental complaint; the second paragraph denying each and every other allegation thereof; and the third being as follows:

"And this defendant, further answering, says that the plaintiff is estopped from claiming any of the mineral found or which may hereafter be found in said thirty-foot strip or compromise ground, for that heretofore, to wit, on or about the seventh day of March, A. D. 1884, one Charles Mayger, who was then and there the predecessor in interest of plaintiff, made, executed and delivered to William Robinson, James Huggins and Frank P. Sterling, who were and are the predecessors in interest of this defendant, a bond for a deed, wherein and whereby he covenanted and agreed to convey the said thirty-foot strip or compromise ground to the predecessors in interest of this defendant, or their assigns, with all the mineral therein contained, a copy of which said bond is hereto attached, marked Exhibit 'A,' and made a part of this answer. That thereafter and after the said Charles Mayger had obtained a United States patent for the whole of said St. Louis lode mining claim, including said thirty-foot strip or compromise ground, the said Mayger, in order to cheat and defraud this defendant, assumed to convey the said compromise ground to the above-named plaintiff. That thereafter this defendant demanded of and from the said plaintiff and from the said Mayger a deed for the said compromise ground in accordance with the terms and provisions of the bond aforesaid, and the said plaintiff and the said Mayger having refused and declining to make, execute or deliver such a deed, this defendant thereafter, and on or about the sixth day of September, A. D. 1894, commenced an action in the district court of the first judicial district of the State of Montana, within and for the county of Lewis and Clarke, wherein this defendant was plaintiff and the above-named plaintiff, together with the said Charles Mayger, were defendants, to compel the specific performance of the said bond for a deed hereinbefore mentioned and set forth; that thereafter such proceedings were had in said action as that on the first day of June, A. D. 1895, judgment was duly made and entered therein in favor of this defendant, the plaintiff therein, and against the plaintiff, defendant in said action, whereby, among other things, it was ordered, adjudged and decreed

that the said bond hereinbefore mentioned be specifically performed, and that the defendant, the above-named plaintiff, make, execute and deliver to this defendant a good and sufficient conveyance in fee simple absolute, free from all encumbrances for the premises mentioned and described in the complaint in said action and in the bond hereinbefore mentioned; that in pursuance of said judgment, order and decree the said plaintiff, on or about the first day of July, A. D. 1895, made and executed a deed to this defendant of and for the said premises and of all the mineral therein contained; and thereafter the said deed was duly delivered to this defendant, a copy of which said deed is hereunto annexed, marked Exhibit 'B,' and made a part of this answer. And this defendant avers that in and by the said proceedings and the said deed the said plaintiff is estopped from claiming any part of the said compromise ground or thirty-foot strip aforesaid, or any mineral contained therein."

Replication was filed, the cause tried by the court and a jury, a verdict returned in favor of plaintiff for $23,209, and judgment rendered thereon. To review this judgment the Montana company prosecuted a writ of error from the Circuit Court of Appeals for the Ninth Circuit, which writ was dated October 7, 1899, and the judgment was affirmed May 14, 1900. 102 Fed. Rep. 403. The writ of error in No. 213 was then allowed.

On the trial the St. Louis company was restricted by the Circuit Court to damages for ore taken north of what was designated as the 108-foot plane of the Nine Hour claim, but the company insisted on the right to recover for ore taken up to what was designated as the Nine Hour 133-foot plane. Accordingly the St. Louis company took out a cross writ of error from the Circuit Court of Appeals dated January 30, 1900, and that court reversed the judgment, October 8, 1900, and remanded the cause for a new trial as to the recovery sought for the conversion and value of certain ores between the planes designated as the 108-foot and 133-foot planes. 104 Fed. Rep. 664. The writ of error in No. 214 was then brought.

Mr. Chief Justice FULLER delivered the opinion of the Court:

The St. Louis company recovered judgment in the Circuit Court for the sum of $23,209. This judgment was affirmed by the Court of Appeals, May 14, 1900, on the writ of error brought by the Montana company.

On the eighth of October, 1900, the Court of Appeals gave judgment on the cross writ of error of the St. Louis company in these words: "On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and the cause is remanded to said Circuit Court for a new trial as to damages alleged and recovery sought for the

conversion and value of certain ores taken from the Drum-Lummon vein on its dip between the planes designated as the 108-foot and 133-foot planes."

To review these judgments thus separately rendered, the Montana company sued out on the same day, October 24, 1900, two writs of error from this court, the records returned on which were filed December 18, 1900, and the cases docketed, and now numbered 213 and 214.

The St. Louis company moved to dismiss the writ of error in No. 213 on the ground that the jurisdiction of the Circuit Court was, according to plaintiff's statement of his own claim, "dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States," and the judgment of the Circuit Court of Appeals was, therefore, not reviewable on error under the sixth section of the judiciary act of March 3, 1891. And at the same time, the St. Louis company moved to dismiss the writ of error in No. 214 on the additional ground that the judgment was not a final judgment. This objection is, of course, well taken, and the writ of error must be dismissed. But when, thereupon, the mandate of the Court of Appeals goes down to the Circuit Court, if in the meantime we have retained jurisdiction in No. 213, the result would be that part of the case would be pending in the court of original jurisdiction, and part in the court of last resort. And should we differ with the Court of Appeals and reverse its judgment brought up in No. 213, our mandate would go to the Circuit Court, which would have been already directed to proceed as to part of the case on other principles. We do not mean to intimate in the slightest degree any conclusion on the merits, but only wish to indicate embarrassments which might arise if one and the same case is treated as two separate and independent cases.

By Rule 22 of this court appeals and cross appeals are heard together, and the practice is the same as to writs and cross writs of error. Where there are cross appeals or cross writs of error in the Circuit Courts of Appeals in cases in which the decrees or judgments are made final in that court by statute, and the case is brought here on certiorari, we consider only the errors assigned by petitioner, unless a cross writ of certiorari is applied for and allowed. *Hubbard* v. *Tod*, 171 U. S. 474.

In this case two writs of error were sued out by the Montana company because there were two judgments rendered below, but the records on both constitute the record in one and the same case, as both writs of error in the Court of Appeals ran to the same judgment of the Circuit Court.

It is said that the complaint described two sections of the vein, one lying north of the 108-foot plane and one between the 108 and 133-foot planes, and that as they were described separately this was equivalent to two counts on distinct causes of action. But we do not understand that this is so, for the complaint is complete in itself, and a single trespass may be

committed on several closes and alleged in a single count. Moreover, although set up in two counts, if there were no misjoinder, which is not pretended here, the recovery would be entire and would require an entire judgment. And as the trial court sustained a recovery as to one part of the vein and not as to the other, and both parties took bills of exceptions, and resorted to the appellate tribunal, we do not think that the judgment as rendered could be retained as a judgment and a retrial had as to so much of the claim as was disallowed. Our attention is not called to any act of Congress or to any rule of practice which authorizes this to be done, nor to any statute or decision of the courts of Montana to that effect, if, indeed, the Federal courts would be obliged to follow such practice if it existed. And the difficulty of the situation is illustrated by the suggestion of counsel that this one action should be regarded as two actions, over one of which the ground of jurisdiction of the Circuit Court was dependent solely on diverse citizenship, and over the other, not.

But we are of opinion that the judgment of the Court of Appeals on the writ of error prosecuted by the St. Louis company operated to reverse the prior judgment of affirmance, inasmuch as the court in terms reversed the judgment of the Circuit Court, although imposing a limitation on the extent of the new trial awarded. Even if the Court of Appeals had power to impose that limitation, the issue so reserved deprived the first judgment of finality so far as our jurisdiction is concerned. *Covington* v. *First National Bank*, *ante*, ——.

The answer to the complaint consisted of a general denial and an affirmative defense that the plaintiff had granted by contract, and afterwards by deed enforced by a decree of court, a thirty-foot strip along a portion of its side line, and the trial court held that the plaintiff could not recover for the 25-foot section between the two planes, but that it could recover northerly from the 108-foot plane. Each party was defeated in some part of its contention, and each party took the case to the Court of Appeals, but the decision of that court left a part of the case undisposed of in the court below. The judgment of reversal being before us in No. 214, we are not compelled to ignore its effect on the judgment in No. 213, and to entertain one writ of error while dismissing the other. *Butler* v. *Eaton*, 141 U. S. 243; *Kimball* v. *Kimball*, 174 U. S. 158; *Mills* v. *Green*, 159 U. S. 654; *Chicago & Vincennes Railroad* v. *Fosdick*, 106 U. S. 84.

When these writs of error were taken out the judgment first rendered had ceased to be final by the operation of the second judgment, which was itself not final, and the result is that both must be dismissed.

Writs of error dismissed.

Mr. Justice GRAY did not hear the argument and took no part in the decision.